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EDITOR'S NOTE

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(8)

No. 86-1430-ASX
Status: GRANTED

Docketed:
March 5, 1987

Title: R. "Roy" Peralta, Petitioner
v.
Heights Medical Center, Inc., dba Heights Hospital, et al.

Court: Court of Appeals of Texas, First District

Counsel for appellant: Kator,Michael J., Schimmel,Bruce Ian

Counsel for appellee: Carnegie,Jack G., Urquhart,Jack E.

Entry	Date	Note	Proceedings and Orders
1	Jan 28 1987		Application for extension of time to docket appeal and order granting same until March 5, 1987 (White, February 3, 1987).
2	Mar 5 1987	G	Statement as to jurisdiction filed.
3	Apr 2 1987		Brief of appellee Heights Medical Ctr., etc. in opposition filed.
4	Apr 8 1987		DISTRIBUTED. April 24, 1987
5	Apr 8 1987		REDISTRIBUTED. April 24, 1987
6	Apr 22 1987	X	Reply brief of appellant R. Roy Peralta filed.
7	Apr 23 1987		Record requested.
8	Apr 30 1987		Record filed.
9	May 6 1987		REDISTRIBUTED. May 21, 1987
10	May 6 1987		REDISTRIBUTED. May 21, 1987
11	May 26 1987		PROBABLE JURISDICTION NOTED.
			**********
13	Jun 16 1987		Order extending time to file brief of appellant on the merits until August 8, 1987.
14	Jul 30 1987	G	Motion of appellant to dispense with printing the joint appendix filed.
15	Aug 7 1987		Brief of appellant R. Roy Peralta filed.
17	Aug 25 1987		Order extending time to file brief of appellee on the merits until October 8, 1987.
18	Sep 21 1987		Motion of appellant to dispense with printing the joint appendix GRANTED.
19	Oct 8 1987		Brief of appellee Heights Medical Ctr., etc. filed.
20	Oct 8 1987		Brief amicus curiae of Texas filed.
21	Oct 9 1987		SET FOR ARGUMENT. Monday, November 30, 1987. (2nd case).
22	Oct 30 1987		CIRCULATED.
23	Nov 23 1987	X	Reply brief of appellant R. Roy Peralta filed.
24	Nov 30 1987		ARGUED.

JURISDICTIONAL

STATEMENT

86 - 1480

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

R. "ROY" PERALTA,

Appellant,

v.

HEIGHTS MEDICAL CENTER, INC.
d/b/a HEIGHTS HOSPITAL and
MR. AND MRS. PAUL SENG-NGAN CHEN

Appeal from the Supreme Court of Texas

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether the Fourteenth Amendment allows a state to enforce a void judgment obtained without personal jurisdiction over and notice to the defendant.

Whether a state can require proof of a meritorious defense as a prerequisite to relief from a default judgment where every procedural rule designed to notify a party that judicial proceedings had been initiated was either violated or ignored.

PARTIES TO THE PROCEEDING

Appellant in this action is R. "Roy" Peralta, an individual residing in Houston, Harris County, Texas. Named as defendants below were Heights Medical Center, Inc., d/b/a/ Heights Hospital, a Texas corporation, and Mr. and Mrs. Paul Seng-Ngan Chen, individuals residing in Houston, Harris County, Texas.

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Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. ———

R. "ROY" PERALTA,

Appellant,

v.

HEIGHTS MEDICAL CENTER, INC.
d/b/a HEIGHTS HOSPITAL and
MR. AND MRS. PAUL SENG-NGAN CHEN

Appeal from the Supreme Court of Texas

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Supreme Court of Texas refused appellant's application for a writ of error on November 5, 1986. *See* App. A *infra* at 1a. The opinion of the Court of Appeals for the First Supreme Judicial District Court of Texas, affirming the trial court decision, was reported in *Peralta* v. *Heights Medical Center, Inc., d/b/a Heights Hospital*, 715 S.W.2d 721 (Tex.Ct.App.-Houston [1st Dist.] 1986). *See* App. B *infra* at 2a. The decision of the 129th District Court for Harris County Texas is unpublished. *See* App. C *infra* at 8a.

JURISDICTION

Pursuant to Tex. R. Civ. P. 329b(f), appellant R. "Roy" Peralta brought a bill of review in the 129th District Court for Harris County, Texas seeking to vacate a default judgment entered against him by that court two years previously. Heights Medical Center, Inc., defendent therein, moved for summary judgment arguing that Mr. Peralta was not entitled to a bill of review because he did not have a meritorious defense to the underlying action. Mr. Peralta responded by asserting that the bill of review procedure, as it had been construed by the courts of Texas and as it applied to the facts of his case, violated the due process provisions of the Fourteenth Amendment.

The District Court considered, but rejected this argument. Mr. Peralta raised this same argument in his appeal to the Court of Appeals for the First Supreme Judicial District of Texas, but this court too declined to find a constitutional violation. In his Application for Writ of Error to the Supreme Court of Texas, Mr. Peralta again argued that requiring him to present a meritorious defense as a prerequisite to vacating a void judgment violated the Fourteenth Amendment. The Texas Supreme Court, on November 5, 1986, refused his application without opinion.

Mr. Peralta filed his Notice of Appeal with the Supreme Court of Texas and the Court of Appeals for the First Supreme Judicial District of Texas on January 27, 1987. *See* App. D and E *infra* at 10a-12a. He squarely challenged the constitutionality of the application of Tex. R. Civ. P. 329b(f) to the facts of his case in each of the courts below, and each court (with the exception of the Supreme Court of Texas, which issued no opinion) squarely upheld the validity of that Rule. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). *See Japan Line Ltd.* v. *County of Los Angeles*, 441 U.S. 434,

440-441 (1979); *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, Section 1, provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 329b(f) of the Texas Rules of Civil Procedure provides:

> On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render a judgment nunc pro tunc under Rules 316 and 317, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power has expired.

Rule 101 of the Texas Rules of Civil Procedure provides:

> The citation shall be styled "the State of Texas" and shall be directed to the defendant and shall command him to appear by filing a written answer to the plaintiff's petition at or before 10:00 o'clock a.m. of the Monday next after the expiration of 20 days after stating the place of holding the Court. It shall state the date of filing the petition, its file number and style of the case, and the date of issuance of the citation, be signed and sealed by the clerk, and shall be accompanied by a copy of plaintiff's petition. The citation shall further direct that if it is not served within 90 days after the date of its issuance, it shall be returned unserved.

Rule 124 of the Texas Rules of Civil Procedure provides:

> In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon appearance by the defendant, as prescribed in these rules, except where otherwise expressly provided by the law or these rules.

Rule 239a of the Texas Rules of Civil Procedure provides:

> At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall send a postcard notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket.

STATEMENT

This case arises out of appellant R. "Roy" Peralta's attempt to obtain relief from a default judgment entered against him in July, 1982.

During the period of time relevant to this appeal, Mr. Peralta owned and operated a commercial diving venture in Houston, Texas. On July 26, 1981, Mr. Peralta guaranteed a hospital debt of approximately $5,000 incurred by one of his employees. This employee apparently failed to make good on the debt, however, and Heights Medical Center, Inc. looked to Mr. Peralta for satisfaction of the debt. Mr. Peralta does not now, and at no time did he ever, dispute the validity of his debt to Heights Medical Center, Inc.

In February, 1982, Heights Medical Center, Inc. brought suit on the debt in the 129th District Court for Harris County, Texas. Pursuant to Tex. R. Civ. P. 101,

Heights Medical Center, Inc. obtained a citation and directed the sheriff to serve Mr. Peralta at his place of business. Under Texas law, this citation had to be served within ninety days of its issuance or be returned to the court unserved. *See* Tex. R. Civ. P. 101. Mr. Peralta was not served within ninety days of the issuance of the citation, and, notwithstanding the sheriff's return of service dated June 16, 1982, he denied ever receiving the citation.[1]

On July 20, 1982, a default judgment was entered against Mr. Peralta. In derogation of Tex. R. Civ. P. 239a, Heights Medical Center, Inc. did not provide a separate certificate of last known address to the clerk of the court. Instead, as a note above the "approved" wording on the default judgment, the attorney for Heights Medical Center, Inc. supplied language apparently intended to comply with the rule. Presumably because of the failure to provide a proper certificate of last known address, the record does not reflect that the clerk sent Mr. Peralta the notice of the entry of a default judgment required by Tex. R. Civ. P. 239a. Mr. Peralta never received any such notice.

On or about March 1, 1983, real property belonging to Mr. Peralta valued at approximately $80,000 was seized and sold at a constable's auction for $1,720 as partial satisfaction of the $5,000 default judgment. Tools

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[1] As judgment in this case was entered in the district court on Heights Medical Center Inc.'s motion for summary judgment, all facts as presented by Mr. Peralta must be accepted as true and all reasonable inferences drawn in his favor. *See Great American Reserve Ins. Co.* v. *San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965). In a direct attack on a default judgment such as this, under Texas law no presumptions arise out of a return of service; it remains a plaintiff's burden to show that proper service was made. *Kem* v. *Krueger*, 626 S.W.2d 143, 144 (Tex. Civ. App.-Fort Worth 1981) (*reh'g denied*).

and other personal property worth over $100,000 were removed from the property and ultimately sold to satisfy the warehouseman's lien incurred for their storage. Mr. Peralta never received notice of the sale, and, indeed, did not learn of the sale until shortly before the purchaser at the constable's sale took possession of his property in February 1984.

On June 21, 1984, Mr. Peralta brought his original bill of review proceeding in the 129th Judicial District Court of Harris County, Texas. In this proceeding, Mr. Peralta contended that he never was personally served with the February 17, 1982, citation; that the citation was void on its face and did not attach the personal jurisdiction of the court; that he did not receive notice of the July 20, 1982, default judgment, from the clerk or otherwise; that he did not receive any notice of the March 1, 1983, constable's sale; and that he was not aware of any judicial action against him until he made his last note payment to the lienholder of the real property in October 1983. Heights Medical Center, Inc. did not dispute Mr. Peralta's contentions other than to rely on the sheriff's return of a void citation reflecting service on June 16, 1982.

In the bill of review proceeding, the trial court granted Heights Medical Center, Inc.'s motion for summary judgment, ruling that, as a matter of law, Mr. Peralta was required to prove a meritorious defense to the underlying debt action in order to obtain relief from the default judgment. The Court of Appeals for the First Supreme Judicial District of Texas, in a unanimous opinion by a three judge panel, affirmed the trial court decision. On November 5, 1986, the Supreme Court of Texas refused Appellant's Application for Writ of Error, in effect, affirming the Court of Appeals decision. This appeal timely followed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal presents important questions concerning the constitutionality of certain aspects of Texas law as they relate to obtaining and vacating default judgments. More specifically, it raises the question of whether a state can condition relief from a judgment obtained without notice and an opportunity to be heard on the presence of a meritorious defense to the claim underlying the judgment. Texas apparently is unique among the states in imposing such a requirement; its rule is contrary to the Federal Rules and the rules of several other jurisdictions. The Federal Rules, and the rules of other states, allow for the vacation of a void judgment (*i.e.*, one obtained without personal jurisdiction over the defendant) at any time and irrespective of whether the defendant has a meritorious defense. We submit that these rules embody the constitutional imperative: no state may enforce a void judgment obtained without notice and without personal jurisdiction over the defendant, nor may it condition an individual's right to obtain relief from such a judgment. This case calls upon the Court to exercise its preeminent authority to guarantee that legislative and judicial pronouncements of the states conform with the Constitution.

A second question presented by this appeal is whether a court's numerous violations of procedures designed to protect the parties and insure fairness in the adjudication constitutes a denial of due process. This Court recognized in *Eagles* v. *United States*, 329 U.S. 304, 314 (1946), that flagrant violations of procedural requirements which result in an unfair hearing can render the judgment subject to collateral attack. This case calls upon the Court to determine whether failure to provide notice at every stage of a proceeding is procedural error of sufficient severity to render the ensuing judgment void.

1. Mr. Peralta has always contended that not only was he never personally served with process, but that he was never properly notified that a default judgment was rendered against him. These contentions were not controverted at the trial court's summary judgment hearing, other than Heights Medical Center, Inc.'s reliance on the defective return of the February 17, 1982, citation.[2]

Texas law provides three methods for a direct attack on a default judgment:

(1) motion for new trial or other direct form of appeal, if filed within thirty days of the date of judgment;

(2) appeal by writ of error if filed six months from the date of the default judgment; and

(3) petition for bill of review.

McEwen v. *Harrison*, 345 S.W.2d 707, 710-711 (Tex. 1961).

Because Mr. Peralta did not learn of the entry of the default judgment until well after the time to file a direct appeal had passed, he was forced to attack the default judgment in question by bill of review. As a general rule, a Texas bill of review plaintiff must plead and prove the following elements:

(1) A meritorious claim or defense;

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[2] As noted above, Mr. Peralta's contention that he never received service of process or otherwise was notified of the suit must be accepted as true for purposes of this appeal. *See supra* at 5, note 1. Had Mr. Peralta received notice, he could have prosecuted a traditional appeal or appeal by writ of error, and, under these facts, he would have been entitled to absolute relief from the July 20, 1982, default judgment. Under Texas law, service of citation even one day after the ninety day period for execution of same is invalid and of no effect. *Lemothe* v. *Cimbalista*, 236 S.W.2d 681, 682 (Tex. Civ. App.-San Antonio (1951) (*writ ref'd*); *accord*, *Kem* v. *Krueger*, 626 S.W.2d at 144.

(2) which he was prevented from making or asserting by fraud, accident or wrongful act of the opposing party;

(3) without any fault or negligence on his own part.

Alexander v. *Hagedorn*, 226 S.W.2d 996, 998 (Tex. 1950).

Texas courts have required a bill of review plaintiff to show a meritorious defense to the underlying default judgment, even where no personal jurisdiction has attached to him. In *McEwen*, 345 S.W.2d at 710, the Supreme Court of Texas stated:

> Accordingly, we construe . . . Rule 329[b(f)] to mean that when the time for filing a motion for new trial has expired and relief may not be obtained by appeal, a proceeding in the nature of a bill of review is the exclusive method of vacating a default judgment rendered in a case which the court had jurisdictional power to render it. *Into this category will fall those cases in which a default judgment is asserted to be void for want of service, or of valid service, of process.*

(Emphasis added.)[3] More specifically, in *Texas Industries, Inc.* v. *Sanchez*, 525 S.W.2d 870, 871 (Tex. 1975), the Texas Supreme Court held that proof of a meritorious defense was a prerequisite to relief even in cases of judgments void for want of personal jurisdiction:

> [W]e specifically approve the holding of the court of civil appeals that proof of defendant not having been served with citation obviates the necessity of pleading and proving the second *Hagedorn* requirement; that the defendant was "prevented from making [his meritorious defense] by fraud, accident or wrongful act of the opposite party . . ."

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[3] "Jurisdictional power to render" refers to subject matter jurisdiction. *McEwen*, 345 S.W.2d at 709, 710. *See also Middleton* v. *Murf*, 689 S.W. 2d 212, 213 (Tex. 1985).

Thus, in Texas, a defendant who has not been served is relieved of the burden of showing any fraud or other irregularity attributable to the other party, yet he will only be heard if he has a meritorious defense to the underlying claim. This is what the Court of Appeals below held, and in this the Texas Supreme Court found no reversible error.

In contrast, the Federal Rules, and the rules of several other jurisdictions, impose no limitations on a defendant's ability to obtain relief from a void judgment. A federal court has no discretion but to grant relief from a judgment obtained without personal jurisdiction over the defendant. *See Jordan* v. *Gilligan*, 500 F.2d 701, 704 (6th Cir.), *cert. denied*, 421 U.S. 991 (1974); *Gold Kist, Inc.* v. *Laurinburg Oil Co.*, 756 F.2d 14, 19 (3d Cir. 1985). This rule apparently prevails throughout the country, and it has been explicitly adopted by several courts. *See, e.g., Chavez* v. *County of Valencia*, 521 P.2d 1154, 1158 (N. Mex. 1974) (no discretion on the part of a trial court but to grant relief where there is no subject matter jurisdiction); *In re Marriage of Stroud*, 631 P.2d 168, 170 n.5 (Colo. 1981) (a judgment is either void or not and relief must be afforded accordingly); *Bryant, Inc.* v. *Walters*, 493 So.2d 933, 937 (Miss. 1986) (void judgments must be vacated). *See, also 2-H Ranch Co, Inc.* v. *Spratt*, 658 P.2d 68, 73 (Wyo. 1983); *Metivier* v. *McDonald's Corp.*, 449 N.E.2d 1241, 1243 (Mass. App. 1983).

Moreover, several courts have explicitly held that proof of a meritorious defense is not a prerequisite to obtaining relief from a void judgment. For example, the Ninth Circuit held in *Thomas P. Gonzalez Corp.* v. *Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980)

> [T]here [is no] requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party show that he has a meritorious defense. Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.

Quoting C. Wright & A. Miller, Federal Practice & Procedure: Civil § 2862, at 197. *See, also, Schwarz* v. *Thomas*, 222 F.2d 305, 309 (D.C. Cir. 1955); *Aquchak* v. *Montgomery Ward Co., Inc.*, 520 P.2d 1352, 1354 & n.5 (Alaska 1974); *Shannon* v. *Norman Block, Inc.*, 256 A.2d 214, 219 (R.I. 1969); *Morgan* v. *Atwell*, 569 P.2d 529, 531 (Okla. App. 1977); *Raine* v. *First Western Bank*, 362 So. 2d 846, 848 (Ala. 1978); *Hengel* v. *Hyatt*, 252 N.W.2d 105, 106 (Minn. 1977).

Of course there is no constitutional requirement that Texas conform its rules of practice and procedure to the federal rules or the rules of the various other states, unless, as here, those rules themselves prescribe the constitutional minima. In this connection, the Fourteenth Amendment does proscribe the taking of property without notice and an opportunity to be heard and it is this proscription, properly embodied in the Federal Rules and the rules of other states, that Tex. R. Civ. P. 329b(f) infringes. For this reason, Texas' imposition of a "meritorious defense" requirement as a prerequisite to vacating a void judgment cannot withstand constitutional scrutiny.

It is axiomatic that the Fourteenth Amendment forbids the exercise of judicial power without notice to the defendant and an opportunity to be heard. *Pennoyer* v. *Neff*, 95 U.S. 714, 732-33 (1878). This court has repeatedly held that a valid judgment imposing a personal obligation or duty in favor of a plaintiff may be entered only by a court having jurisdiction over the person of the defendant. *National Exchange Bank of Tiffin, Ohio* v. *Wiley*, 195 U.S. 257, 263 (1904); *Hanson* v. *Denckla*, 357 U.S. 235, 250 (1958); *Kulko* v. *Superior Court of California*, 436 U.S. 84, 91 (1978). Mr. Peralta had

neither notice of the potential deprivation of his property nor an opportunity to be heard before judgment was rendered against him. Yet notice and an opportunity to be heard before property is taken is the "root requirement" of the Due Process Clause. *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971).

Moreover, as this Court recently emphasized in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 543 (1985), notice and an opportunity to be heard prior to the deprivation is necessary "even if the facts are clear." Even though the facts of Mr. Peralta's indebtedness were clear, the final outcome of the litigation was anything but certain. With proper notice of the suit, he could have paid the indebtedness, perhaps negotiated a settlement or impleaded the former employee whose note he cosigned. He could have, and would have, done anything but let Height's Medical Center, Inc.'s claim go to judgment and thus risk a constable's auction to satisfy that judgment. Thus, even though he had no defense to the suit, he still had every reason to answer and thereby forestall the immense loss he suffered through the constable's sale.

As this Court stated in *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424 (1915):

> To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits.

This is no less true today than it was seventy years ago, and, accordingly, the fact that Mr. Peralta had no defense to the merits of the underlying action does not lessen his right to notice and an opportunity to be heard on that cause.[4]

[4] Not only did Mr. Peralta have property at stake, but he had a liberty interest as well in protecting his "good name, reputation, honor [and] integrity." *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971). Without notice, and an opportunity to be heard, Mr. Peralta suffered the infamy of becoming a judgment debtor and the consequent loss of commercial standing and business reputation. For this reason as well, Tex. R. Civ. P. 329b(f) is unconstitutional.

Finally, if rendering a judgment without notice violates the Fourteenth Amendment, restricting an individual's ability to attack that judgment must also violate the Fourteenth Amendment. A judgment rendered in violation of the Fourteenth Amendment to the Constitution is void. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291 (1980). It is not entitled to enforcement in the rendering state or any other state. *Hanson* v. *Denckla*, 357 U.S. at 250. Since the Constitution precludes a state from enforcing any such judgment, *a fortiori* no state can place conditions on an individual's right to obtain relief from such a judgment.[5]

2. The number and breadth of procedural irregularities in the underlying (debt guarantee) default judgment also constitute a denial of Mr. Peralta's due process rights. At the bill of review summary judgment hearing, Mr. Peralta introduced an affidavit in which he denied: (1) being served with process; (2) being given notice of a default judgment against him; and (3) being given notice of the execution sale of his property. The record in this case clearly shows that rule 101 of the Texas Rules of Civil Procedure was violated because Mr.

[5] The Court of Appeals below dismissed Mr. Peralta's constitutional claims, holding that under the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the requirement of showing a meritorious defense was "not onerous." *See* App. B *infra* 6a. This balancing approach is, however, wholly inapposite. The minimum imperative of the Fourteenth Amendment is notice and an opportunity to be heard before the deprivation takes place. Balancing addresses whether a particular form of notice and hearing is adequate given the nature of the interests at stake. *Mathews* v. *Eldridge* is not instructive where, as here, there has been no notice and no opportunity to be heard.

Peralta was allegedly served with an expired citation. Rule 124 was violated when the default judgment was granted in this case as the district court could not properly enter summary judgment upon facially defective process. Rule 239a was not complied with by either the clerk or opposing counsel. Counsel for Heights Medical Center, Inc. in the underlying default judgment proceeding failed to provide a certificate of last known address as contemplated by the rule, while the clerk failed to send out the required notice of default judgment or even docket same.

This court has held that procedural irregularities will result in the denial of due process where the defects are so unfair as to deprive the proceedings of vitality. *Eagles* v. *United States*, 329 U.S. at 314. Similarly, the Fifth Circuit has recognized that a combination of procedural errors can reach a level that renders a judgment void for want of due process. *Bass* v. *Hoagland*, 172 F.2d 205, 209 (5th Cir.), *cert. denied*, 338 U.S. 816 (1949); *Fehlhaber* v. *Fehlhaber*, 681 F.2d 1015, 1027 (5th Cir. 1982).

Also, this Court has consistently stated that the Fourteenth Amendment requires judicial proceedings to be conducted in a fundamentally fair manner. *Lassiter* v. *Department of Social Service of Durham City*, 452 U.S. 18, 33 (1981). Again, in 1983, this Court stated that errors in state law can rise to a level where they deprive an individual litigant of his federal constitutional rights. *Barclay* v. *Florida*, 436 U.S. 940, 956 (1983).

Certainly, the proceedings complained of here cannot be characterized as fundamentally fair where virtually every rule designed to inform a litigant that judicial proceedings have been initiated against him were violated or ignored.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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March, 1987

APPENDICES

APPENDIX A

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November 5, 1986

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RE: Case No. C-5811

STYLE: R. "ROY" PERALTA
v. HEIGHTS MEDICAL CENTER, INC., d/b/a HEIGHTS HOSPITAL ET AL.

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

MARY K. WAKEFIELD
Clerk

By /s/ Blanca E. Moren
Deputy

APPENDIX B

Appeal from the 129th District Court of Harris County. (Tr. Ct. No. 84-40941). Opinion delivered by Chief Justice Evans, Justices Warren and Smith sitting.

No. 01-85-0961-CV

R. "ROY" PERALTA,
Appellant

v.

HEIGHTS MEDICAL CENTER INC. d/b/a
HEIGHTS HOSPITAL

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on August 19, 1985. After hearing the cause on the transcript of the record and inspecting the same, it is the opinion of this Court that there was no error in the judgment. It is therefore CONSIDERED, ADJUDGED AND ORDERED that the judgment of the Court below be in all things affirmed.

It is further ordered that the appellant, R. "ROY" PERALTA, and his surety, Fidelity and Deposit Company, jointly and severally, pay all costs incurred by reason of this appeal.

It is further ordered that this decision be certified below for observance.

Judgment rendered by panel consisting of Chief Justice Evans, Justices Warren and Smith.

COURT OF APPEALS
FIRST SUPREME JUDICIAL DISTRICT

No. 01-85-0961-CV

R. "ROY" PERALTA,
Appellant

v.

HEIGHTS MEDICAL CENTER, INC. d/b/a
HEIGHTS HOSPITAL,
Appellee

On Appeal from the 129th District Court
of Harris County, Texas
Trial Court Cause No. 84-40941

OPINION

This is an appeal from a summary judgment denying a bill of review to set aside a default judgment. We affirm.

In February 1982, appellee filed suit against appellant for $5,603.80, pursuant to a guarantee of payment of a hospital debt incurred by one of appellant's employees. Citation issued the date suit was filed, and appellant was served on June 16, 1982, but failed to answer or appear. On July 20, 1982, the trial court entered a default judgment for the amount pledged, plus attorney's fees and costs.

The appellant filed this bill of review proceeding in June 1984. Appellee subsequently filed a motion for summary judgment on the ground that appellant had no meritorious defense. The trial court entered the summary judgment in favor of the appellee on August 19, 1985.

On appeal, appellant asserts in one point of error that the trial court erred in granting appellee's motion for summary judgment because of the following: (1) the original judgment was void because service of process was defective on its face as it was effected more than 90 days after issuance; (2) appellee failed to furnish a certificate of last known address to the court prior to its entry of the default judgment as required by Tex. R. Civ. P. 239a; (3) the clerk failed to notify appellant of the default judgment, as required by Rule 239a; and (4) appellant was denied due process when his property was sold to satisfy a void default judgment.

The appellant concedes that he did not prove a meritorious defense to the original action, but that the foregoing defects relieve him of the burden of doing so. We do not agree.

The three elements of a bill of review that the complainant must plead and prove are (1) a meritorious defense to the cause of action, (2) which he was prevented from asserting by the fraud, accident, or wrongful act of the opposing party, (3) unmixed with any fault or negligence of his own. *Baker v. Goldsmith*, 582 S.W.2d 404 (Tex. 1979); *Alexander v. Hagedorn*, 148 Tex. 565, 568-569, 226 S.W.2d 996, 998 (1950).

When the defendant has not been properly served with process, he may be relieved from the burden of pleading and proving that he was prevented from making a meritorious defense by the fraud, accident, or wrongful act of the opposing party. *See, Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240, 243-244 (Tex. 1974); *Texas Industries, Inc. v. Sanchez*, 525 S.W.2d 870, 871 (Tex. 1975); *Kantor v. Herald Publishing Co., Inc.*, 645 S.W.2d 625, 628 (Tex. App.—Tyler 1983, writ ref'd n.r.e.); *Northcutt v. Jarrett*, 585 S.W.2d 874, 876 (Tex.

Civ. App.—Amarillo) writ ref'd n.r.e per curiam, 592 S.W.2d 930 (Tex. 1979). Likewise, when the clerk of the court fails to send notice of a default judgment to the defendant because the plaintiff failed to certify the address, the bill of review claimant is excused from showing the wrongful conduct, fraud, or accident of the opposite party. *Baker v. Goldsmith*, 582 S.W.2d at 407; *Hanks v. Rosser*, 378 S.W.2d 31 (Tex. 1964); *Edgin v. Blasi*, 706 S.W.2d 353 (Tex. App.—Forth Worth 1986, no writ); *Buckler v. Tate*, 572 S.W.2d 562, 564 (Tex. Civ. App.—Houston ([1st Dist.] 1978, no writ). But in both instances, the claimant must still plead and prove a meritorious defense to the original action. *Id.* Because the appellant failed to plead and prove a meritorious defense, the trial court did not err in entering the summary judgment.

We also overrule the appellant's contentions that the trial court's entry of the summary judgment deprived him of due process of law as guaranteed under the Fourteenth Amendment of the United States Constitution. In a bill of review proceeding, the movant's burden of establishing a meritorious defense is met when he produces proof from which the court determines, as a matter of law, that the defense is not conclusively barred and that the movant will prevail in retrial if no contradictory evidence is offered. *Baker v. Goldsmith*, 582 S.W.2d at 408-409; *Kantor v. Herald Publishing Co., Inc.*, 645 S.W.2d at 627. The requirement that such proof be made is not onerous. Appellant's sole point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Frank G. Evans
FRANK G. EVANS
Chief Justice

Justices Warren and Smith sitting.

For Publication. Tex. R. Civ. P. 452.

Judgment rendered and opinion delivered July 3, 1986.
True copy attest:

/s/ Kathryn Cox
KATHRYN COX
Clerk of the Court

APPENDIX C

ORDER, SIGNED: August 19, 1985. ENTERED: Volume 3086, Page 596, General Minutes, District Courts, in and for Harris County, Texas.

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
129TH JUDICIAL DISTRICT

No. 84-40941

HEIGHTS MEDICAL CENTER, d/b/a
HEIGHTS HOSPITAL,
Plaintiffs,

vs.

R. "ROY" PERALTA,
Defendant.

ORDER

On this 19th day of August, 1985 came on to be heard Heights Medical Center, Inc. d/b/a Heights Hospital's Motion for Summary Judgment and the Court having considered the pleadings, summary judgment evidence and arguments of counsel find said motion to be meritorious. It is there ORDERED, ADJUDGED and DECREED:

That R. "Roy" Peralta's Petition for Bill of Review is hereby dismissed with prejudice.

Signed this 19th day of August, 1985.

/s/ [Illegible]
Judge Presiding

APPROVED:

HOLTZMAN & URQUHART

By: Jack Carnegie
RANDALL FINLEY
JACK CARNEGIE

Attorneys for Heights Medical
Center, d/b/a Heights Hospital

APPENDIX D

IN THE SUPREME COURT OF TEXAS

No. C-5811

R. "ROY" PERALTA,
Petitioner

v.

HEIGHTS MEDICAL CENTER, INC.
and MR. and MRS. PAUL SENG-NGAN CHEN,
Respondents

[Filed Jan. 27, 1987]

NOTICE OF APPEAL

Notice is hereby given that the above named Petitioner appeals to the United States Supreme Court the decision of the Supreme Court entered in this action on the 5th day of November, 1986.

Respectfully submitted,

/s/ Stephen P. Dillon
STEPHEN P. DILLON
OF COUNSEL
SCHIMMEL & ASSOCIATES
8300 Bissonnet, Suite 170
Houston, Texas 77074
(713) 988-7822

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Notice of Appeal was sent to Mr. Jack Carnegie and Randall N. Finley, 900 Two Houston Center, 909 Fannin, Houston, Texas 77010, attorneys for respondent, Heights Medical Center, Inc., and to Mr. Robert Hopper, Gordon, Quan and Associates, P.C., 4848 Loop Central Drive, Suite 800, Houston, Texas 77081, by certified mail, return receipt requested, on this, the 26th day of January, 1987.

/s/ Stephen P. Dillon
STEPHEN P. DILLON

APPENDIX E

IN THE COURT OF APPEALS
FOR THE
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

No. 01-85-00961-CR

R. "ROY" PERALTA,
Petitioner

vs.

HEIGHTS MEDICAL CENTER, INC.
and MR. and MRS. PAUL SENG-NGAN CHEN,
Appellee

[Filed Jan. 27, 1987]

NOTICE OF APPEAL

Notice is hereby given that the above named appellant appeals to the United States Supreme Court the judgment of this court which was affirmed by the Texas Supreme Court on November 5th, 1986, with the notation "writ refused, no reversible error".

Respectfully submitted,

/s/ Stephen P. Dillon
STEPHEN P. DILLON
OF COUNSEL
SCHIMMEL & ASSOCIATES
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Houston, Texas 77074
(713) 988-7822

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Notice of Appeal was sent to Mr. Jack G. Carnegie and Randall N. Finley, 900 Two Houston Center, 909 Fannin, Houston, Texas 77010, attorney for Respondent Heights Medical Center, Inc., and to Mr. Robert Hopper, Gordon, Quan and Associates, P.C., 4848 Loop Central Drive, Suite 800, Houston, Texas 77081, by certified mail, return receipt requested, on this, the 26th day of January, 1987.

/s/ Stephen P. Dillon
STEPHEN P. DILLON

MOTION

No. 86-1430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

R. "ROY" PERALTA,

Appellant,

v.

HEIGHTS MEDICAL CENTER, INC.
d/b/a HEIGHTS HOSPITAL AND
MR. AND MRS. PAUL SENG-NGAN CHEN,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF TEXAS

MOTION TO DISMISS

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April, 1987

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

R. "ROY" PERALTA,

Appellant,

V.

HEIGHTS MEDICAL CENTER, INC.
d/b/a HEIGHTS HOSPITAL AND
MR. AND MRS. PAUL SENG-NGAN CHEN,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF TEXAS

MOTION TO DISMISS

BACKGROUND FACTS

On July 20, 1982, a default judgment was rendered against Appellant in Cause No. 82-07516, Heights Medical Center, d/b/a Heights Hospital v. R. "Roy" Peralta, in the District Court of Harris County, Texas, 129th Judicial District. When the court granted default judgment against Appellant, (1) a citation was on file in accordance with Rules 107 and 239 of the Texas Rules of Civil Procedure, (2) there was a certificate of last known address attached to the Motion for Default Judgment in compliance with Rule 239a of the Texas Rules of Civil Procedure, and (3) the Constable's return showed that personal service had

been made on Appellant. Heights Hospital's claim was liquidated and before signing the judgment, the trial court considered evidence in accordance with Rule 241 of the Texas Rules of Civil Procedure.

The record conclusively proves, and Appellant now concedes, that he has no meritorious defense to Heights Hospital's claim.

The only defect shown by the record is that the citation was outdated when it was served. The record does not show whether or not notice of a judgment was sent to Appellant by the Court Clerk.

On June 21, 1984, two years after the judgment was rendered, Appellant filed this suit seeking an equitable bill of review to set aside the default judgment. The basis for Appellant's petition for bill of review is that he allegedly was not properly served with process and received no notice of the default judgment rendered against him. Heights Hospital moved for summary judgment on the grounds that Appellant had no meritorious defense to the original lawsuit and therefore was not entitled to a bill of review.[1]

In response to Heights Hospital's motion for summary judgment, Appellant presented an affidavit stating that he had not been served with process and that he had not

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[1] In response to Heights Hospital's motion for summary judgment, Appellant argued that he had a meritorious defense because by the time he filed his petition for bill of review, the statute of limitations had run on Heights Hospital's cause of action. It is undisputed that limitations had not run at the time the default judgment was rendered. Appellant abandoned his limitations argument on appeal.

received notice of a judgment being rendered against him in Cause No. 80-16418.[2]

Appellant presented no evidence to the trial court regarding the value of any property on which Heights Hospital levied pursuant to the default judgment. Heights Hospital properly objected to any consideration of factual allegations not supported by evidence.

Appellant did not raise any constitutional issue in response to the motion for summary judgment.

The trial court granted Heights Hospital's motion for summary judgment. Appellant then filed, in the trial court, a motion for rehearing in which he raised his due process argument for the first time. The record does not reflect whether the trial court considered Appellant's due process argument. The trial court's order simply denied the motion for rehearing without specifying the reason. The Court of Appeals affirmed the trial court's judgment dismissing Appellant's petition for bill of review and the Texas Supreme Court denied Appellant's application for writ of error with the notation "Refused. No Reversible Error."

ARGUMENT AND AUTHORITIES

1. This Appeal Should Be Dismissed Because This Case Is Not Within This Court's Appellate Jurisdiction

It is essential to this Court's jurisdiction on appeal that there be an explicit and timely insistence in the state court that a state statute, as applied, is repugnant to the federal Constitution. *Richmond Newspapers, Inc.* v. *Virginia*, 448

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[2] That cause number is not the case in which the default judgment was rendered. Hence, there is a defect in the evidence that Appellant did not receive notice of the judgment.

U.S. 555, 562-63 n.4 (1980). Appellant never explicitly challenged the constitutionality of Rule 329b(f) of the Texas Rules of Civil Procedure, nor did the state courts rule on the constitutionality of Rule 329b. Appellant argued only that he should not be required to prove a meritorious defense as a condition to setting aside a default judgment.

Rule 329b(f) of the Texas Rules of Civil Procedure simply confers authority to set aside a judgment by a bill of review. It does not specify the requirements for a bill of review or include the meritorious defense requirement which is central to Appellant's complaint. Appellant's attack on the state court's allegedly improper exercise of authority in this particular case is not the same as an attack on the constitutionality of the statute conferring the authority. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 562-63 n.4. Since the constitutionality of Rule 329b(f) has not been drawn into question, jurisdiction by appeal does not lie. *Id.*

If this Court treats Appellant's papers as a petition for writ of certiorari, the petition should be denied. There are no special and important reasons for granting a petition for writ of certiorari as are required by Supreme Court Rule 17. See section 3 below.

2. **This Appeal Should Be Dismissed Because The Federal Question Sought To Be Reviewed Was Not Timely Or Properly Raised And Was Not Expressly Passed On By The Trial Court**

Appellant did not present his constitutional challenge to the trial court in his initial response to Heights Hospital's motion for summary judgment. Appellant also failed to

plead unconstitutionality in his second amended petition for bill of review as is required by Rule 44 of the Texas Rules of Civil Procedure. *City of South Houston* v. *Sears*, 488 S.W.2d 169, 173 (Tex. Civ. App. — Houston [14th Dist.] 1972, no writ) (failure to plead unconstitutionality results in a waiver of that claim).

Appellant first raised the constitutional issue in his motion for rehearing filed after the trial court granted the motion for summary judgment. The trial court denied the motion for rehearing without specifying the reasons for the denial.

Texas law precluded the trial court from considering Appellant's untimely due process argument. For example, in *Benson* v. *City of San Antonio*, 715 S.W.2d 143 (Tex. App. — San Antonio 1986, writ ref'd n.r.e.), the defendant filed a motion for summary judgment and the plaintiffs filed a written response. The trial court granted the motion for summary judgment. The plaintiffs then filed a motion for new trial in which they argued for the first time that the statute involved in the case was unconstitutional. The issue presented to the appellate court was "whether such issues, raised for the first time in the motion for new trial, may be considered on appeal as grounds for reversal." 715 S.W.2d at 144. The court of appeals held:

> [W]hen a motion for new trial is filed after summary judgment has been granted, the district court may consider only the record as it existed prior to the granting of the summary judgment.
>
> Because the plaintiffs failed to raise these issues at the summary judgment hearing, we hold that they may not be assigned as error on appeal.
>
> The summary judgment is affirmed.

715 S.W.2d at 145. *Accord Hill* v. *Milani*, 678 S.W.2d 203, 204 (Tex. App. — Austin 1984), *aff'd*, 686 S.W.2d 610 (Tex. 1985); *Parchman* v. *United Liberty Life Insurance Co.*, 640 S.W.2d 694, 696 (Tex. App. Houston [14th Dist.] 1982, writ ref'd n.r.e.). *See Nava* v. *Steubing*, 700 S.W.2d 668, 670 (Tex. App. — San Antonio 1985, no writ) (presumption exists that trial court did not consider response to motion for summary judgment filed later than 7 days before hearing); Tex. R. Civ. P. 166-A(c) (response to motion for summary judgment is to be filed at least 7 days before hearing).

For the same reason, neither the Court of Appeals nor the Texas Supreme Court should have considered Appellant's due process argument. In this regard, it is important that the Texas Supreme Court did not "refuse" Appellant's application for writ of error; it refused the application with the notation "No Reversible Error." This notation is important because the Texas Supreme Court's ruling cannot be considered as a ruling on Appellant's due process argument.

Texas Rule of Appellate Procedure 133 states:

> (a) Notation on Denial of Application. In all cases where the judgment of the court of appeals is correct and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." *In all cases where the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application with the notation "Refused. No Reversible Error."*

(Emphasis added). Accordingly, the Texas Supreme Court's ruling may well reflect the fact that the Court of Appeals need not have ruled on the constitutional issue. *See Myers* v. *Martinez*, 160 Tex. 102, 326 S.W.2d 171, 172 (1959) (withdrawing notation "Refused" and substituting "Refused. No Reversible Error." because the court of appeals need not have decided the question of a statute's constitutionality).

Since Appellant failed to plead or raise the constitutional issue until after the trial court had ruled on the motion for summary judgment and neither the trial court nor the Texas Supreme Court expressly ruled on that issue, this appeal should be dismissed.

3. This Appeal Should Be Dismissed Because It Does Not Present A Substantial Federal Question

The meritorious defense element of the Texas Bill of Review procedure is not of constitutional dimensions. In all jurisdictions, the merits of the claim and defense may ultimately be tried if a defendant attacks a judgment. An allegation that the judgment is "void" is not a magical incantation that will allow a defendant to defeat a plaintiff's claim despite the merits of the situation. Unlike Texas, however, some jurisdictions apparently utilize a bifurcated procedure when a judgment is alleged to be void for a lack of either subject matter or personal jurisdiction. *See e.g., In re Marriage of Stroud*, 631 P.2d 168, 170 (Colo. 1981) (subject matter jurisdiction); *Chavez* v. *County of Valencia*, 521 P.2d 1154, 1158 (N. Mex. 1974) (subject matter jurisdiction); *Thomas P. Gonzalez Corp.* v. *Consejo Nacional De Produccion De Costa Rica*, 614 F.2d

1247, 1256 (9th Cir. 1980) (court could not obtain personal jurisdiction due to lack of minimum contacts). In such jurisdictions, the defendant may obtain a judgment setting aside the former judgment without showing a meritorious defense. If the defendant prevails in setting aside the former judgment, the merits of the claim will be tried when the plaintiff refiles its suit against the defendants.

Texas uses this bifurcated procedure for judgments that are void for lack of subject matter jurisdiction. *McEwen* v. *Harrison*, 162 Tex. 125, 345 S.W.2d 706, 709-11 (1961). The two step procedure is necessary in such cases because the court has no power to try the merits of the claim. It can only set aside the original judgment. If the court sets aside the judgment, the plaintiff must then refile his suit in the proper court.

On the other hand, when a judgment is alleged to be invalid for some reason other than lack of subject matter jurisdiction, Texas courts try all of the issues in a single suit which results in a new judgment.

> The only relief to an injured party, other than by appeal, is by direct suit setting up equitable grounds for the relief sought. When such a petition for relief at a subsequent term is brought before the proper court, it is not contemplated that the cause shall be divided and tried by piecemeal; one in which a judgment is rendered setting aside the former judgment and the other in a trial on the merits, but every issue arising on the merits must be disposed of, and the relief prayed for is either denied or granted in the one proceeding.

Texas Employers' Ins. Ass'n. v. *Arnold*, 126 Tex. 466, 88 S.W.2d 473, 474 (1935); *Humphrey* v. *Harrell*, 29 S.W.2d 963, 964 (Tex. Comm'n App. 1930, judgmt adopted). *Accord McEwen* v. *Harrison*, 345 S.W.2d at 710 ("Our

decisions require that the two issues be tried together so that the court may render a new final judgment.").

Whether Texas uses a one step or a two step procedure to reach the merits of the claim and defense is not of constitutional import. The one step procedure simply promotes judicial economy.

Moreover, the execution sale that took place after the default judgment was rendered against appellant has no relevance to the validity of the judgment or whether the Texas bill of review procedure is constitutionally adequate to review default judgments. A petition for a bill of review is strictly an attack on an allegedly invalid judgment. The validity of a judgment depends solely on events that occurred at or before the time the judgment was signed. Therefore, events occurring after the judgment has been signed have no bearing on the constitutional adequacy of the bill of review procedure.

CONCLUSION

For the foregoing reasons, this Court should dismiss this case.

Respectfully submitted,

. . . . . .
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April, 1987

REPLY BRIEF

No. 86-1430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

R. "ROY" PEPALTA,

Appellant,

v.

HEIGHTS MEDICAL CENTER, INC.
d/b/a HEIGHTS HOSPITAL and
MR. AND MRS. PAUL SENG-NGAN CHEN

Appeal from the Supreme Court of Texas

REPLY BRIEF IN OPPOSITION TO APPELLEE HEIGHTS MEDICAL CENTER, INC.'S MOTION TO DISMISS

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April, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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R. "ROY" PERALTA,

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v.

HEIGHTS MEDICAL CENTER, INC.
d/b/a HEIGHTS HOSPITAL and
MR. AND MRS. PAUL SENG-NGAN CHEN

Appeal from the Supreme Court of Texas

REPLY BRIEF IN OPPOSITION TO APPELLEE HEIGHTS MEDICAL CENTER, INC.'S MOTION TO DISMISS

In its Motion to Dismiss, Appellee Heights Medical Center, Inc. asserts that this appeal should be dismissed because: (1) this case is not within the Court's appellate jurisdiction; (2) the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on by the trial court; and (3) this case does not present a substantial federal question. For the reasons stated herein, and for the reasons stated in our Jurisdictional Statement, Heights Medical Center, Inc.'s contentions are without merit, and, accordingly, this Court should note probable jurisdiction.

ARGUMENT AND AUTHORITIES

1. This Appeal Is Within The Court's Appellate Jurisdiction.

This court has consistently stated that an appeal properly lies under 28 U.S.C. § 1257(2) where the decision complained of determines the validity of a state statute as applied; it need not have determined the validity of the statute on its face or for every purpose. *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921). Moreover, the term "state statute" has been given a broad meaning, to include court orders or rules of a legislative nature. *Lathrop* v. *Donahue*, 367 U.S. 820, 824 (1961); *In re Griffiths*, 413 U.S. 717 (1973).

Rule 329b(f) of the Texas Rules of Civil Procedure was promulgated by the Supreme Court of Texas in a proper exercise of its rule making authority. This rule has been applied to Mr. Peralta to require a meritorious defense to a default judgment, a requirement he protests violates the Fourteenth Amendment. Mr. Peralta is not here challenging "the lawless exercise of authority" by the Texas Courts. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 563 n.4 (1980), *quoting Phillips* v. *United States*, 312 U.S. 246, 252 (1941). Rather, his challenge is to the constitutionality of Rule 329b(f) as it has been applied to him. This Court has jurisdiction on appeal to hear such a challenge.

2. The Constitutional Question Was Properly Raised Below.

The Texas First Court of Appeals expressly passed on Mr. Peralta's federal constitutional claim and rejected it. *Peralta* v. *Heights Medical Center, Inc.*, 715 S.W.2d 721, 722 (Tex. App.—Houston [1st Dist.] 1986). The Texas Supreme Court refused to review the case, and, in effect, affirmed the judgment of the trial court. Since the Texas First Court of Appeals expressly overruled Mr. Peralta's federal constitutional claim and the Texas

Supreme Court expressly declined to pass on it,* there is no question that Mr. Peralta's federal constitutional claim was raised properly in the state courts. *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974); *Herring* v. *New York*, 422 U.S. 853, 856 (1975).

Moreover, the issue of whether a federal question was sufficiently and properly raised is itself a federal question. *Street* v. *New York*, 394 U.S. 576, 583 (1969). Where the record as a whole or by clear intendment shows that the federal question was raised, the claim is regarded as having been adequately presented. *Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928). Since the inception of the bill of review proceeding, Mr. Peralta has complained that the underlying default judgment was void and that he should not be required to show a meritorious defense in order to obtain relief therefrom. In his Motion for Rehearing of the trial court's summary judgment, Mr. Peralta alleged that the application of state bill of review procedure violated his Fourteenth Amendment due process rights. Viewed as a whole, the record in this case clearly shows that Mr. Peralta's federal constitutional claims were raised to the courts below.

3. This case presents a substantial federal question.

Although the term "substantial federal question" defies precise definition, certainly a federal question of substance is presented when a state court decides an issue in a way that is not in accord with applicable decisions of this court. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73-74 (1955). As pointed out in Mr. Peralta's Jurisdictional Statement, this Court has repeatedly held that a judgment obtained without notice

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* Heights Medical Center, Inc.'s attempt to look behind the reasons for the Texas Supreme Court's decision not to grant the writ of error is unenlightening. *Cf. Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 919 (1950).

and an opportunity to be heard is void and entitled to no force or effect whatsoever. Should this Court dismiss this appeal, this case will establish a precedent, at least in Texas, that liberty and property may be taken without due process of law. This Court cannot allow such a precedent to be established.

To be sure, Texas may be the only state which allows judgments obtained without personal jurisdiction over the defendant to be enforced. Yet this singularity does not diminish the importance of the question presented in this appeal. The Fourteenth Amendment applies equally in all fifty states; no matter how many or how few jurisdictions may choose to ignore it, it is the duty of this Court to conform abhorrent laws to the imperatives of the Constitution.

CONCLUSION

For the foregoing reasons, Appellee Heights Medical Center, Inc.'s Motion to Dismiss should be denied, and probable jurisdiction should be noted.

Respectfully submitted,

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April, 1987

APPELLANT'S BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

R. "ROY" PERALTA,

Appellant,

v.

HEIGHTS MEDICAL CENTER, INC.
d/b/a HEIGHTS HOSPITAL and
MR. AND MRS. PAUL SENG-NGAN CHEN

On Appeal from the Supreme Court of Texas

BRIEF FOR APPELLANT

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August, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Whether the Fourteenth Amendment allows a state to enforce a void judgment obtained without personal jurisdiction over and notice to the defendant.

Whether a state can require proof of a meritorious defense as a prerequisite to relief from a default judgment entered without personal jurisdiction where every procedural rule designed to notify a party that judicial proceedings had been initiated was either violated or ignored.

PARTIES TO THE PROCEEDING

Appellant in this action is R. "Roy" Peralta, an individual residing in Houston, Harris County, Texas. Named as defendants below were Heights Medical Center, Inc., d/b/a Heights Hospital, a Texas corporation, and Mr. and Mrs. Paul Seng-Ngan Chen, individuals residing in Houston, Harris County, Texas.

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IN THE

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R. "ROY" PERALTA,

Appellant,

v.

HEIGHTS MEDICAL CENTER, INC.
d/b/a HEIGHTS HOSPITAL and
MR. AND MRS. PAUL SENG-NGAN CHEN

On Appeal from the Supreme Court of Texas

BRIEF FOR APPELLANT

OPINIONS BELOW

The Supreme Court of Texas refused appellant's application for a writ of error on November 5, 1986. *See* App. A to the Jurisdictional Statement (hereinafter "J.S.") at 1a. The opinion of the Court of Appeals for the First Supreme Judicial District Court of Texas, affirming the trial court decision, was reported in *Peralta* v. *Heights Medical Center, Inc., d/b/a Heights Hospital*, 715 S.W.2d 721 (Tex.Ct.App.-Houston [1st Dist.] 1986). *See* J.S. App. B at 2a. The decision of the 129th District Court for Harris County, Texas is unpublished. *See* J.S. App. C at 8a.

JURISDICTION

Appellant R. "Roy" Peralta brought a bill of review pursuant to Tex. R. Civ. P. 329b(f) seeking to vacate a default judgment entered against him in the 129th District Court for Harris County, Texas two years previously. In opposing defendant Heights Medical Center, Inc.'s motion for summary judgment, and in his briefs to the Court of Appeals for the First Supreme Judicial District and the Supreme Court of Texas, Mr. Peralta contended that Rule 329b(f) was unconstitutional. The court of appeals rendered a judgment in favor of the rules' constitutionality and the Supreme Court of Texas refused Mr. Peralta's writ of error.

Mr. Peralta filed his Notice of Appeal with the Supreme Court of Texas and the Court of Appeals for the First Supreme Judicial District of Texas on January 27, 1987. *See* J.S. App. D and E at 10a-12a. Mr. Peralta filed his Jurisdictional Statement on March 5, 1987 and this Court noted probable jurisdiction on May 26, 1987. Jurisdiction in this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, Section 1, provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 329(f) of the Texas Rules of Civil Procedure provides:

> On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render a judgment nunc pro tunc under Rules 316 and 317, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power has expired.

Rule 101 of the Texas Rules of Civil Procedure provides:

> The citation shall be styled "the State of Texas" and shall be directed to the defendant and shall command him to appear by filing a written answer to the plaintiff's petition at or before 10:00 o'clock a.m. of the Monday next after the expiration of 20 days after stating the place of holding the Court. It shall state the date of filing the petition, its file number and style of the case, and the date of issuance of the citation, be signed and sealed by the clerk, and shall be accompanied by a copy of plaintiff's petition. The citation shall further direct that if it is not served within 90 days after the date of its issuance, it shall be returned unserved.

Rule 124 of the Texas Rules of Civil Procedure provides:

> In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon appearance by the defendant, as prescribed in these rules, except where otherwise expressly provided by the law of these rules.

Rule 239a of the Texas Rules of Civil Procedure provides:

> At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall send a postcard notice thereof to the party against whom the judgment was ren-

dered at the address shown in the certificate, and note the fact of such mailing on the docket.

STATEMENT

This case arises out of appellant R. "Roy" Peralta's attempt to obtain relief from a default judgment entered against him in July, 1982.

During the period of time relevant to this appeal, Mr. Peralta owned and operated a commercial diving venture in Houston, Texas. On July 26, 1981, Mr. Peralta guaranteed a hospital debt of approximately $5,000 incurred by one of his employees. This employee apparently failed to make good on the debt, however, and Heights Medical Center, Inc. looked to Mr. Peralta for satisfaction of the debt. Mr. Peralta does not now, and at no time did he ever, dispute the validity of his debt to Heights Medical Center, Inc.

In February, 1982, Heights Medical Center, Inc. brought suit on the debt in the 129th District Court for Harris County, Texas. Pursuant to Tex. R. Civ. P. 101, Heights Medical Center, Inc. obtained a citation and directed the sheriff to serve Mr. Peralta at his place of business. Under Texas law, this citation had to be served within ninety days of its issuance or be returned to the court unserved. *See* Tex. R. Civ. P. 101. Mr. Peralta was not served within ninety days of the issuance of the citation, and, notwithstanding the sheriff's return of service dated June 16, 1982, he denied ever receiving the citation.[1]

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[1] As judgment in this case was entered in the district court on Heights Medical Center Inc.'s motion for summary judgment, all facts as presented by Mr. Peralta must be accepted as true and all reasonable inferences drawn in his favor. *See Great American Reserve Ins. Co.* v. *San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965). In a direct attack on a default judgment such as this, under Texas law no presumptions arise out of a return of service; it remains a plaintiff's burden to show that proper service was made. *Kem* v. *Krueger*, 626 S.W.2d 143, 144 (Tex. Civ. App. Fort Worth 1981) (*reh'g denied*).

On July 20, 1982, a default judgment was entered against Mr. Peralta. In derogation of Tex. R. Civ. P. 239a, Heights Medical Center, Inc. did not provide a separate certificate of last known address to the clerk of the court. Instead, as a note above the "approved" wording on the default judgment, the attorney for Heights Medical Center, Inc. supplied language apparently intended to comply with the rule. Presumably because of the failure to provide a proper certificate of last known address, the record does not reflect that the clerk sent Mr. Peralta the notice of the entry of a default judgment required by Tex. R. Civ. P. 239a. Mr. Peralta never received any such notice.

On or about March 1, 1983, real property belonging to Mr. Peralta valued at approximately $80,000 was seized and sold at a constable's auction for $1,720 as partial satisfaction of the $5,000 default judgment. Tools and other personal property worth over $100,000 were removed from the property and ultimately sold to satisfy the warehouseman's lien incurred for their storage. Mr. Peralta never received notice of the sale, and, indeed, did not learn of the sale until October, 1983. The purchaser at the constable's sale did not attempt to take possession of the property until February 1984.

On June 21, 1984, Mr. Peralta brought his original bill of review proceeding in the 129th Judicial District Court of Harris County, Texas. In this proceeding, Mr. Peralta contended that he never was personally served with the February 17, 1982, citation; that the citation was void on its face and did not attach the personal jurisdiction of the court; that he did not receive notice of the July 20, 1982 default judgment, from the clerk or otherwise; that he did not receive any notice of the

March 1, 1983, constable's sale; and that he was not aware of any judicial action against him until he made his last note payment to the lienholder of the real property in October 1983. Heights Medical Center, Inc. did not dispute Mr. Peralta's contentions other than to rely on the sheriff's return of a void citation reflecting service on June 16, 1982.

In the bill of review proceeding, the trial court granted Heights Medical Center, Inc.'s motion for summary judgment, ruling that, as a matter of law, Mr. Peralta was required to prove a meritorious defense to the underlying debt action in order to obtain relief from the default judgment. The Court of Appeals for the First Supreme Judicial District of Texas, in a unanimous opinion by a three judge panel, affirmed the trial court decision. On November 5, 1986, the Supreme Court of Texas refused Appellant's Application for Writ of Error, in effect, affirming the Court of Appeals' decision. This appeal timely followed.

SUMMARY OF THE ARGUMENT

No state can condition a litigant's relief from a void judgment obtained in violation of established constitutional principles, whether by requiring the showing of a meritorious defense or otherwise. To do so imbues otherwise void judgments with some validity, which this Court has said are not entitled to enforcement in the rendering state or any other state. If states are allowed to condition or restrict a litigant's right to obtain relief from judgments rendered in violation of due process standards, a spectre arises of states following those standards only when it is convenient to do so. The long history of this court's pronouncements over the requisites to obtain a personal judgment in compliance with the Fourteenth Amendment would then be seriously weakened, if not altogether eliminated. If a judgment is void for want of personal jurisdiction, it is absolutely void for any and all purposes.

In addition, this court and the lower federal courts have indicated that flagrant violations of procedural rules designed to give timely notice and comply with Fourteenth Amendment due process standards can render the judgment void and subject to direct and collateral attack. In the default judgment proceedings complained of herein, virtually every Texas Rule of Procedure designed to inform a litigant that judicial power was being invoked against him were either violated or ignored. The errors complained of herein have risen to an unconstitutional level sufficient to render the default judgment proceedings absolutely null and void.

ARGUMENT

A. Texas Rule 329b(f) Is Unconstitutional

The court below, construing Tex. R. Civ. P. 329b(f), refused to grant Mr. Peralta relief from a default judgment obtained against him without notice or an opportunity to respond because he did not have a meritorious defense to the underlying cause of action. We submit that so construed Rule 329b(f) is unconstitutional, for it allows the taking of liberty and property without due process of law.

1. Mr. Peralta was never served with process and he had no actual notice of the institution of the suit until over a year after judgment was entered against him. Because he did not learn of the suit or the judgment until after the deadlines for filing a motion for new trial or appeal (thirty days), or appeal by writ of error (six months) had passed, he could only attack the judgment by filing a bill of review under Rule 329b(f).[2]

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[2] Had Mr. Peralta learned of the entry of judgment in time to file an appeal or appeal by writ of error, he would have been able to set aside the default judgment irrespective of whether he had a meritorious defense to the underlying action. The default judgment was obtained upon reliance on a facially defective citation:

McEwen v. *Harrison*, 345 S.W.2d 707, 710-11 (Tex. 1961). Under Texas law, however, as a prerequisite to obtaining relief from the default judgment, Mr. Peralta was required to show that he had a meritorious defense to the claim upon which the default judgment was entered. *Alexander* v. *Hagedorn*, 226 S.W.2d 996, 998 (Tex. 1950); *McEwen*, 345 S.W.2d at 710. *See, also, Texas Industries, Inc.* v. *Sanchez*, 525 S.W.2d 870, 871 (Tex. 1975) (relieving an unserved defendant of the obligation of showing any fraud or other irregularity attributable to the plaintiff, but nonetheless requiring the presentation of a meritorious defense.)

Mr. Peralta had no meritorious defense to the underlying action. He never disputed that he guaranteed his former employee's debt to Heights Medical Center, Inc. or that he was obligated to make good on that bill once demand was made. Notwithstanding this, Mr. Peralta had compelling reasons to answer and not let the claim go to default. Had he notice of the suit, he could have impleaded the former employee for whom he guaranteed the debt, he could have attempted to work out a settlement, or he could simply have paid the debt. He could have taken any number of steps to protect his property and his business standing. But because he had no notice that an action had been commenced against him, and because he had no meritorious defense, Texas law allowed his property to be taken from him and denied him all recourse to forestall that deprivation.

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the return of service showed purported service on Mr. Peralta after the ninety day life of the citation had expired. Under Texas law, service of a citation even one day after this ninety day period is invalid. *Lemothe* v. *Cimbalista*, 236 S.W.2d 681, 682 (Tex. Civ. App.—San Antonio 1951) (*writ refused*); *Kem* v. *Kruger*, 626 S.W.2d 143, 144 (Tex. Civ. App.—Fort Worth 1981) (*reh'g denied*); *Steve Tyrell Productions, Inc.* v. *Ray*, 674 S.W.2d 430 (Tex. Ct. App.—3d Dist. 1984, *no writ*) (notice must comply with statutory and constitutional requisites.)

2. Due process analysis necessarily begins with identification of the property or liberty interest entitled to due process protections. *Brock* v. *Roadway Express, Inc.*, 107 S.Ct. 1740, 1746 (1987). Here, both Mr. Peralta's property rights and liberty interests have been implicated. No extended discussion is needed to identify the property interest at stake. Protectible property is present where "rules or understandings . . . secure certain benefits and . . . support claims of entitlement to those benefits." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). In our society, there is perhaps nothing to which an individual has a greater "claim of entitlement" than his own capital, and the personalty and realty he may choose to purchase with that capital. Mr. Peralta had a judgment lien entered against him, and at a constable's auction lost over $180,000 in real and personal property, in order to satisfy his former employee's $5,000 debt. This loss, occasioned by state action, is a cognizable deprivation under the Fourteenth Amendment. *See Parratt* v. *Taylor*, 451 U.S. 527, 536 (1981) (holding that a prisoner's $23.50 hooby kit falls within the definition of property.)

Mr. Peralta's liberty interest is similarly straightforward: he had a cognizable interest in protecting his "good name, reputation, honor [and] integrity," *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971), and this interest was impaired when Mr. Peralta became a judgment debtor on his own guarantee. Indeed, even apart from the damage to his business reputation, Mr. Peralta had a liberty interest in not being subject to a judgment in a forum to which he had not properly been called to answer. *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause. The

personal jurisdiction requirement recognizes and protects an individual liberty interest.")[3]

3. Traditional due process analysis would ordinarily next call for a measuring of the interests at stake and a determination of what procedures are necessary to provide adequate safeguards against their erroneous deprivation. *See, e.g., Brock* v. *Roadway Express*, 107 S.Ct. at 1747. But this step is unnecessary here, for Mr. Peralta's rights were summarily extirpated with no process whatsoever. As this Court has repeatedly emphasized, "[t]he fundamental requirement of due process is to be heard 'at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976), *quoting Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). *See also Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971) (pre-deprivation notice and hearing is the "root requirement" of due process.)

Because Mr. Peralta was never served as required by Tex. R. Civ. P. 101, and because he never otherwise learned of the suit before the default judgment was entered, he never had notice or an opportunity to respond to protect his interests. Thus, Mr. Peralta was denied property and liberty without due process of law. Accordingly, because the judgment was obtained without personal jurisdiction over Mr. Peralta and in derogation of his due process rights, it is void. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291 (1980).

4. That a court cannot constitutionally enforce a void judgment obtained without personal jurisdiction over and

[3] To be sure, *Insurance Corp. of Ireland, Ltd.* and related cases treating personal jurisdiction as a liberty component of due process (*i.e. Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985)) have involved "minimum contacts" questions of personal jurisdiction rather than service of process questions. Yet this line of authority is equally applicable here, for an individual has no less an interest in avoiding being improperly subjected to a judgment in his own state than he does in a foreign state.

notice to the defendant is established beyond peradventure. This constitutional imperative is embodied in the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 60(b)(4), and this is the rule in the many jurisdictions whose rules are modeled after the federal rules.[4] Indeed, a federal court has no discretion but to grant relief from a void judgment obtained without personal jurisdiction over the defendant. *See Jordan* v. *Gilligan*, 500 F.2d 701, 704 (6th Cir.), *cert. denied*, 421 U.S. 991 (1974); *Gold Kist, Inc.* v. *Laurinburg Oil Co.*, 756 F.2d 14, 19 (3d Cir. 1985). This rule prevails throughout the country and it has been explicitly adopted by virtually every court which has considered the issue.[5] Moreover, several courts have

[4] Twenty-four states, and the District of Columbia, have to a greater or lesser extent, modeled their rules after the federal rules and thus allow for relief from a void judgment. *See* Ala. R. Civ. P. 69(b); Ariz. R. Civ. P. 60(c); Colo. R. Civ. P. 60(b); Del. Ch. R. 60(b); D.C. R. Civ. P. 60(b); Ind. R. Trial P. 60(b)(6); Ky. R. Civ. P. 60.02; Me. R. Civ. P 60(b); Mass. R. Civ. P. 60(b); Minn. R. Civ. P. 60.02; Mont. R. Civ. P. 60(b); Nev. R. Civ. P. 60(b); N.J. Civ. Prac. R. 4:50-1; N.M. R. Civ. P. 60(b); N.D. R. Civ. P. 60(b); Ohio R. Civ. P. 60(b) (includes void judgments within "any other reason justifying relief"); Or. R. Civ. P. 71(B); S.D. Codified L. Ann. 15-6-60(b); Tenn. R. Civ. P. 60(b); Utah R. Civ. P. 60(b); Vt. R. Civ. P. 60(b); Wash. Sup. Ct. Civ. R. 60(b); Wis. Civ. P. Ch. 806.07(1); W. Va. R. Civ. P. 60(b); Wyo. R. Civ. P. 60(b). *See also*, La. Rev. Stat. Ann. Art. 2002; Va. Code Ann. § 8.01-428; Ga. Civ. Prac. Act § 9-11-60(f) (a judgment void because of lack of jurisdiction over the person or subject matter may be attacked at any time.)

[5] *See Raine* v. *First Western Bank*, 362 S.2d 846 (Ala. 1978); *Kennecop Mortgage and Equities, Inc.* v. *First National Bank of Fairbanks*, 685 P.2d 1232 (Alaska 1984); *Preston* v. *Denkins*, 382 P.2d 686 (Ariz. 1963); *Pounders* v. *Chicken Country, Inc.*, 624 S.W.2d 445 (Ark. App. 1981); *In Re Marriage of Stroud*, 631 P.2d 168 (Colo. 1981); *Broaca* v. *Broaca*, 435 A.2d 1016 (Conn. 1980); *Roebuck* v. *Walker-Thomas Furniture Co., Inc.*, 310 A.2d 845 (D.C. 1973); *Falkner* v. *Amerifirst Federal Savings and Loan Assoc.*, 489 So.2d 758 (Fla. Dist. Ct. App. 1986); *Lawing* v. *Erwin*, 303 S.E.2d 444 Ga. 1983); *Calasa* v. *Greenwell*, 633 P.2d 553 (Haw. Ct. App. 1981); *Puphal* v. *Puphal*, 669 P.2d 191 Idaho 1983); *Giralmo* v.

explicitly held that proof of a meritorious defense cannot be made a prerequisite to obtaining relief from a void judgment. For example, the Ninth Circuit held in *Thomas P. Gonzalez Corp.* v. *Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980)

> [T]here [is no] requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party show a that he has a meritorious defense. Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.

Quoting C. Wright & A. Miller, Federal Practice & Procedure: Civil § 2862, at 197.

While this rule has attained such universal application, it is not because of the happenstance of likeminded

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O'Connell, 495 N.E.2d 1180 (Ill. App. Ct. 1986); *Automatic Feeder Company* v. *Tobey*, 558 P.2d 101 (Kan. 1976); *LeGlue Buick, Inc.* v. *Smith*, 390 So.2d 262 (La. Ct. App. 1980); *Miles* v. *Hamilton*, 309 A.2d 631 (Md. 1973); *Metivier* v. *McDonald's Corp.*, 449 N.E.2d 1241 (Mass. App. 1983); *Petroff* v. *Petroff*, 276 N.W.2d 503 (Mich. Ct. App. 1979); *Hengel* v. *Hyatt*, 252 N.W.2d 105 (Minn. 1977); *Southern Trucking Service, Inc.* v. *Mississippi Sand and Gravel, Inc.*, 483 So. 2d 321 (Miss. 1986); *Smoot* v. *Judd*, 61 S.W. 854 (Mo. 1901); *Hankins* v. *Smarr*, 137 S.W.2d 499 (Mo. 1940); *Shields* v. *Pirkle Refrigerated Freight Lines, Inc.*, 591 P.2d 1120 (Mont. 1979); *Glouchester City Trust Co.* v. *Goodfellow*, 3 A.2d 561 (N.J. 1939); *Chavez* v. *County of Valencia*, 521 P.2d 1154 (N.M. 1974); *McMullen* v. *Arnone*, 437 N.Y.S. 2d 373 (N.Y. App. Div. 1981); *State* v. *Red Arrow Tobar Sales Co.*, 298 N.W. 2d 514 (N.D. 1980); *Sperry* v. *Hlutke*, 483 N.E. 2d 870 (Ohio 1984); *Tammie* v. *Rodriguez*, 570 P.2d 332 (Okla. 1977); *Karr* v. *Shorey*, 575 P.2d 981 (Or. 1978); *Graham* v. *Kutler*, 418 A.2d 676 (Pa. 1980); *Reynaud* v. *Koszela*, 473 A.2d 281 (R.I. 1984); *Kromer* v. *Sullivan*, 225 N.W. 2d 591 (S.D. 1975); *Garcia* v. *Garcia*, 712 P.2d 288 (Utah 1986); *Bennett Estate* v. *Travelers Insurance Company*, 438 A.2d 380 (Vt. 1981); *Manor* v. *Hindman*, 97 S.E. 332 (Va. 1918); *Brickhum Investment Co.* v. *Veinham Corporation*, 731 P.2d 533 (Wash. Ct. App. 1987); *West* v. *West*, 262 N.W.2d 87 (Wis. 1978); *2-H Ranch Company, Inc.* v. *Simmons*, 658 P.2d 68 (Wyo. 1983).

legislators and judges. Instead, it is because the Fourteenth Amendment commands it:

> Since the adoption of the Fourteenth Amendment . . ., the validity of judgments may be directly questioned and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom the court has no jurisdiction do not constitute due process of law.

Pennoyer v. *Neff*, 95 U.S. 714, 733 (1878). To be sure, much has changed in the contours of personal jurisdiction analysis since *Pennoyer*, but it is no less true today than it was over one hundred years ago that the Fourteenth Amendment prohibits states from enforcing judgments obtained without due process of law.

It is of no constitutional significance that here Mr. Peralta is attempting to obtain relief from a void judgment rather than resisting the enforcement of such a judgment. The constitutional precepts remain the same: A judgment rendered in violation of the Fourteenth Amendment is void. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 291. It is not entitled to enforcement in the rendering state or in any other state. *Hanson* v. *Denckla*, 357 U.S. 235, 250 (1958). Such a judgment is a legal nullity which cannot, in any respect, be given force and effect. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("It is elementary that one is not bound by a judgment *in personam* resulting from litigation . . . to which he has not been made a party by service of process.")

5. Finally, there can be no notion that failing to provide Mr. Peralta notice and an opportunity to respond was in some sense "harmless error." Foremost, Mr. Peralta suffered severe economic loss because he was denied due process, and he suffered injury to his business name and reputation by becoming a judgment debtor on his own note. But even aside from the concrete harm

which has befallen Mr. Peralta because he was never notified of the suit brought against him, harmless error analysis is inapposite where due process is implicated:

> To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits.

Coe v. *Armour Fertilizer Works*, 237 U.S. 413, 424 (1915); *see, also, Carey* v. *Piphus*, 435 U.S. 247, 266 (1978) (the right to due process is "absolute.") Texas' construction of its rule to allow relief for constitutional deprivations only to those who can show that they would have prevailed had they been served is tantamount to a rule requiring plaintiffs to serve process on defendants only when their complaints are unfounded. Such a construction turns due process on its head.

B. Flagrant Violations Of Procedural Rules Render A Judgment Void And Unenforceable

The number and breadth of procedural irregularities in the underlying (debt guarantee) default judgment also constitute a denial of Mr. Peralta's due process rights. At the bill of review summary judgment hearing, Mr. Peralta introduced an affidavit in which he denied: (1) being served with process; (2) being given notice of a default judgment against him; and (3) being given notice of the execution sale of his property. The record in this case clearly shows that rule 101 of the Texas Rules of Civil Procedure was violated because Mr. Peralta, if served at all (which is denied), would have been served with an expired citation in direct contravention of Tex. R. Civ. P. 101. Tex. R. Civ. P. 124 was violated when the default judgment was granted in this case as the district court could not properly enter a default judgment upon facially defective process. Tex. R. Civ. P. 239a was not complied with by either the clerk or opposing counsel. Counsel for Heights Medical Center, Inc. in the underlying default judgment proceeding failed to provide a certificate of last known address as contemplated by the rule, while the clerk failed to send out the required notice of default judgment or even docket same as required.

This court has held that procedural irregularities will result in the denial of due process where the defects are so unfair as to deprive the proceedings of vitality. *Eagles* v. *United States*, 329 U.S. 304, 314 (1946). Similarly, the Fifth Circuit has recognized that a combination of procedural errors can reach a level that renders a judgment void for want of due process. *Bass v. Hoagland*, 172 F.2d 205, 209 (5th Cir.), *cert. denied*, 338 U.S. 816 (1949); *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1027 (5th Cir. 1982).

Also, this Court has consistently stated that the Fourteenth Amendment requires judicial proceedings to be conducted in a fundamentally fair manner. *Lassiter v. Department of Social Services of Durham City*, 452 U.S. 18, 33 (1981). Again, in 1983, this Court stated that errors in complying with state procedural law can rise to a level where they deprive an individual litigant of his federal constitutional rights. *Barclay v. Florida*, 436 U.S. 940, 956 (1983).

Certainly, the proceedings complained of here cannot be characterized as fundamentally fair where virtually every rule designed to inform a litigant that judicial proceedings have been initiated against him were violated or ignored.

CONCLUSION

For the foregoing reasons, the judgment of the Court below should be reversed and judgment entered in favor of Mr. Peralta.

Respectfully submitted,

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August, 1987

APPELLEE'S

BRIEF

86 1430

(5)

No. 86-1320

IN THE

Supreme Court of The United States

OCTOBER TERM, 1987

R. "ROY" PERALTA,
Appellant,

v.

HEIGHTS MEDICAL CENTER, INC.
d/b/a HEIGHTS HOSPITAL and
MR. AND MRS. PAUL SENG-NGAN CHEN,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

BRIEF FOR APPELLEE HEIGHTS MEDICAL CENTER, INC. d/b/a HEIGHTS HOSPITAL

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October, 1987

QUESTIONS PRESENTED

Whether due process requires a state to set aside a default judgment and grant a retrial where (1) the defendant admits to having no meritorious defense to the default judgment and (2) the defendant has a right to directly or collaterally attack the enforcement of the default judgment regardless of whether the judgment itself is set aside and a retrial is granted.

As discussed in detail below, Appellee disputes Appellant's statement of the Questions Presented, as well as Appellant's Statement of Facts. In particular, Appellee disputes Appellant's statement that the issue of *enforcement* of the judgment in question is or should be before this Court. This Court's appellate jurisdiction relates to the Texas courts' determination that the meritorious defense requirement of the equitable bill of review procedure is constitutional. The bill of review procedure relates to the *judgment* in question and not to any subsequent enforcement.

PARTIES TO THE PROCEEDINGS

Appellant in this action is R. "Roy" Peralta, an individual residing in Houston, Harris County, Texas. Appellees, named as defendants below, are Heights Medical Center, Inc. d/b/a Heights Hospital, a Texas corporation ("Appellee"), and Mr. and Mrs. Paul Seng-Ngan Chen, individuals residing in Houston, Harris County, Texas. Mr. and Mrs. Seng-Ngan Chen are defendants in another lawsuit which currently is pending in Harris County, Texas, in which Appellant, as plaintiff, is attacking the validity of the execution sale of certain of his property made pursuant to the judgment at issue in the present case. Appellant's attack is based on the allegation that the default judgment was void for want of personal jurisdiction.

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

BRIEF FOR APPELLEE

OPINIONS BELOW

Appellee adopts Appellant's statement of opinions below.

JURISDICTION

Appellee adopts Appellant's statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellee adopts Appellant's statement of the constitutional and statutory provisions involved, except as supplemented below. Appellant notes that the rule cited by Appellant as "329(f) of the Texas Rules of Civil Procedure" is actually Rule 329b(f).

The introduction to *Texas Rule of Civil Procedure 329b* provides:

> The following rules shall be applicable to motions for new trial and motions to modify, correct or reform judgments (other than motions to correct the record under Rules 316 and 317) in all district and county courts.

28 U.S.C. § 1257(2) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

STATEMENT

Appellee does not accept the Statement of Appellant insofar as it differs from Appellee's Statement which follows.

On July 20, 1982, a default judgment for $5,603.80 plus attorneys' fees and costs was rendered against Appellant in Cause No. 82-07516, *Heights Medical Center, d/b/a Heights Hospital* v. *R."Roy" Peralta*, in the 129th Judicial District Court of Harris County, Texas. The basis for the case in which the default judgment was rendered was that Appellant owed Appellee $5,603.80 pursuant to a guarantee of payment executed by Appellant in favor of Appellee.

The record shows that when the default judgment was granted against Appellant, a citation was on file in accordance with Rules 107 and 239 of the Texas Rules of Civil Procedure. The Constable's return shows personal, albeit

untimely[1] service upon Appellant. Appellant disputes having received service.

There is a certificate of last known address attached to the Motion for Default Judgment in compliance with Rule 239a of the Texas Rules of Civil Procedure. The record does not show whether or not notice of the judgment was sent to Appellant by the court clerk. Appellant alleges he did not receive notice of the judgment.

On June 21, 1984, two years after the judgment was rendered, Appellant filed the present suit seeking an equitable bill of review to set aside the default judgment. Appellee moved for summary judgment on the grounds that Appellant had no meritorious defense to the original lawsuit and therefore was not entitled to a bill of review setting aside the default judgment. Appellee assumed, for the purposes of the motion for summary judgment, that Appellant had not been properly served in the original lawsuit. Thus, the issue of whether service of process on Appellant was validly made has never been litigated.

Appellant responded to the motion for summary judgment by arguing that (1) he had not been properly served, (2) he had not received notice of a judgment being rendered against him in Cause No. 80-16418,[2] and (3) he had a meritorious defense. Appellant contended that the default judgment was therefore "void" and should be set aside. Appellant's response to the motion for summary judgment

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[1] The record shows that the citation was served 119 days after issuance, which is beyond the 90-day period citations are deemed valid under Texas law. Apparently, a valid citation was outstanding at the time of service and the constable mistakenly served the outdated citation.

[2] Cause No. 80-16418 is not the case in which the default judgment was rendered.

said nothing about the execution sale and did not raise any constitutional issue.

The trial court found that Appellant had no meritorious defense to the default judgment and therefore granted the motion for summary judgment, thus refusing to set aside the default judgment and grant a new trial. Consequently, the narrow issue decided by the trial court was that Appellant was not entitled to a bill of review setting aside the default judgment in the absence of a meritorious defense.

The trial court did not rule on the issue of whether the default judgment was void for lack of proper service or whether the execution sale could be set aside.

Appellant moved for rehearing and argued for the first time that his property had been sold to satisfy the default judgment. Appellant contended that this alleged denial of due process entitled him to a bill of review setting aside the default judgment.

Appellee responded that absent a meritorious defense, Appellant is not entitled to have the default judgment set aside and cannot maintain an action for a bill of review. The trial court denied Appellant's motion for rehearing.

In the Texas Court of Appeals, Appellant abandoned any pretense of having a meritorious defense and argued that he should not be required to show a meritorious defense because of the alleged lack of proper service and notice of the judgment. In addition, Appellant made allegations totally unsupported by any evidence in the record that, pursuant to the default judgment, his property worth $180,000 had been sold at a constable's auction for $1,720. Appellant concluded that the default judgment should be set aside on due process grounds. The Texas Court of Appeals affirmed the dismissal of the petition for bill of review. The

Texas Supreme Court refused Appellant's application for writ of error with the notation "no reversible error."

The only issue decided by the courts below was that Appellant had no meritorious defense to the original default judgment and therefore was not entitled to a bill of review setting aside the default judgment and granting a new trial. The Texas courts never considered the issue of the validity of the original judgment because Appellee assumed for the purposes of its motion for summary judgment that the original judgment was void. The issue of whether the original default judgment was in fact void and the validity of any enforcement of that judgment was not decided by the courts below. These issues are the subject of a pending separate suit; Cause No. 86-50755, *Rogelio Peralta and San Juana Peralta* v. *Paul Seng-Ngan Chen, Mrs. Paul Seng-Ngan Chen, also known as Ms. Guo Bay-Le, Charles Hueter, Jr. and wife, Florence Inzez Hueter*, in the 133rd District Court for Harris County, Texas. In this separate suit Appellant is currently challenging the validity of the seizure of his property. The petition in Cause No. 86-50755 is reproduced as an appendix to this brief.

According to Appellant's petition in Cause No. 86-50755, his property was sold to the Chens at a foreclosure sale under a first deed of trust on November 1, 1982. The execution sale of the same property to the Chens occurred on March 1, 1983.

SUMMARY OF THE ARGUMENT

Texas law provides that if a judgment is void for want of personal jurisdiction, it is absolutely void for any and all purposes. Texas law allows Appellant to attack any enforcement of a judgment that is void for want of personal jurisdiction, and Texas civil procedure provides Appellant with a number of methods to make such an attack.

The equitable bill of review under Rule 329b(f) of the Texas Rules of Civil Procedure, however, relates to the setting aside of *judgments* and granting new trials. It does not relate to challenging the *enforcement* of an allegedly invalid judgment.

Given the limited purpose of the bill of review, Texas courts have held it to be inefficient and inequitable to grant a new trial to a party who will be precluded, as a matter of law, from obtaining a different result. Under a bill of review the court granting the new trial is also responsible for the new trial. Therefore, the court, in effect, simultaneously deals with the request for new trial and a motion for summary judgment by the plaintiff in the new trial. A denial of a new trial due to the lack of meritorious defense does not prevent Appellant from attacking enforcement of the original judgment, if that judgment was void, or if the enforcement itself was improper. Indeed, as mentioned above, Appellant is currently in the process of doing just that.

Only the validity of the meritorious defense requirement of the bill of review procedure should be before this Court since that was the only issue considered by the courts below. The various Texas procedures which allow Appellant to challenge or resist enforcement of the judgment in question are not within the scope of Rule 329b, were not presented to the courts below and were not ruled on by them. Thus, review of such procedures should not be within this Court's appellate jurisdiction in this case. Additionally, such matters are not ripe since Appellant is currently in the process of challenging the validity of the enforcement of the default judgment in the Texas courts.

Appellant has argued that he is entitled to constitutional protection not only of his property, but also of his liberty, which he claims, in this case, involves protecting his good name, reputation, honor and integrity. He thus argues that

he has been unconstitutionally harmed if he is unable to set aside the judgment in question and have it removed from the record, even though he is entitled to prevent its enforcement.

Appellant did not raise this argument in the courts below. Appellant has thus not preserved any error relating to this issue, and he may not raise this issue here. Additionally, this Court has found there to be no deprivation of liberty or property sufficient to invoke the Fourteenth Amendment, arising solely from harm to reputation.

Finally, application of the three criteria set out in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), clearly demonstrates that the "meritorious defense" requirement of the Texas bill of review procedure does not violate the due process requirements of the Fourteenth Amendment. Texas' interest in judicial economy and the finality of judgments, together with Appellee's interest in avoiding the expense and delay of relitigating a matter in which there are no facts in dispute, clearly outweigh Appellant's interest in being granted a new trial on a matter which he does not contest.

ARGUMENT

Texas Rule 329b(f) is Constitutional

Rule 329b(f) of the Texas Rules of Civil Procedure is constitutional notwithstanding the Texas courts' requirement that before a party can set aside a judgment and have a new trial, he must set up a meritorious defense. Appellant has argued that this requirement allows the taking of liberty and property without due process. Appellee responds that:

(1) Rule 329b(f) does not relate to the taking of property and, when considered in conjunction with other Texas Rules of Civil Procedure, does not allow the taking of property without due process.

(2) In a case on appeal, like this, this Court's review should be limited to a review of the constitutionality of Rule 329b(f).

(3) Appellant failed to adequately raise in the state court proceedings his arguments relating to his "liberty" interests; such arguments are therefore barred at this late date.

(4) There is no deprivation of liberty or property resulting from an unenforceable judgment sufficient to invoke the procedural protection of the due process clause.

(5) Applying the three criteria set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), demonstrates that Rule 329b(f) does not violate due process requirements.

(1) Rule 329b(f) does not relate to the taking of property and, when considered in conjunction with other Texas Rules of Civil Procedure, does not allow the taking of property without due process.

Appellant states in his brief that under the circumstances, "he could only attack the judgment by filing a bill of review under Rule 329b(f)." Appellant's brief at 7. Although this may be technically correct, the implication that Appellant cannot attack the enforcement of this judgment, if void, is a misinterpretation of Texas law which is crucial to this appeal. As the introduction to Rule 329b indicates, Rule 329b(f) does not relate to enforcement of the judgment. Appellant has various options under Texas law to prevent or set aside the enforcement of the judgment if he can show that it was void due to lack of personal jurisdiction.

Appellant is correct that a judgment rendered without personal jurisdiction is void and of no effect. *Remley* v. *Kleypas*, 645 F. Supp. 690, 692 (E.D. Tex. 1986); *Robertson* v. *Ranger Insurance Co.*, 689 S.W.2d 209, 210 (Tex. 1985); *Austin Independent School District* v. *Sierra Club*, 495

S.W.2d 878, 881 (Tex. 1973); *In re Marriage of Peace*, 631 S.W.2d 790, 794 (Tex. App. — Amarillo 1982, no writ); *Mega* v. *Anglo Iron & Metal Co.*, 601 S.W.2d 501, 503 (Tex. Civ. App. — Corpus Christi 1980, no writ); *Holder* v. *Scott*, 396 S.W.2d 906, 910 (Tex. Civ. App. — Texarkana 1965, writ ref'd n.r.e.); *Litton* v. *Waters*, 161 S.W.2d 1095, 1096 (Tex. Civ. App. — San Antonio 1942, writ ref'd);

Texas law considers a void judgment to be an absolute nullity and considers all acts performed under it to be nullities. Thus a void judgment cannot be the basis of valid enforcement which passes title. *Remley* v. *Kleypas*, 645 F. Supp. at 694; *Moody's Heirs* v. *Moeller*, 72 Tex. 635, 10 S.W. 727 (1889); *Bonougli* v. *Brown*, 185 S.W. 47 (Tex. Civ. App. — San Antonio 1916), *aff'd*, 111 Tex. 275, 232 S.W. 490 (1921); *First Nat'l Bank* v. *South Beaumont Land & Improvement Co.*, 128 S.W. 436 (Tex. Civ. App. 1910, writ ref'd n.r.e.). It has been held that a void judgment does not have to be appealed; it may be ignored. *Fulton* v. *Finch*, 162 Tex. 351, 346 S.W.2d 823, 827 (1961). A void judgment may be impeached in any action, direct or collateral. *Holder* v. *Scott*, 396 S.W.2d at 910. An execution based on a void judgment has specifically been held, like the judgment, to be void and subject to attack at any time in any court. *Remley* v. *Kleypas*, 645 F. Supp. at 694; *Bonougli* v. *Brown*, 185 S.W. at 49; *Kellogg* v. *Southwestern Lumber Co.*, 44 S.W.2d 742, 745 (Tex. Civ. App. — Beaumont 1931, writ ref'd).

If the court which rendered the judgment against Appellant did not have personal jurisdiction at the time it rendered the judgment, Appellant had and still has the right to directly or collaterally attack any enforcement of that judgment. *Remley* v. *Kleypas*, 645 F. Supp. at 692. A direct attack could include an injunction restraining execution. *Id.*; *Pena* v. *Bourland*, 72 F. Supp. 290, 294 (S.D. Tex. 1947).

Appellant can also collaterally attack the judgment. *Robertson* v. *Ranger Insurance Company*, 689 S.W.2d at 210; *Bonougli* v. *Brown*, 185 S.W. at 49; *Texaco, Inc.* v. *LeFevre*, 610 S.W.2d 173, 176 (Tex. Civ. App. — Houston [1st Dist.] 1980, no writ); *Moody's Heirs* v. *Moeller*, 10 S.W. at 729. A collateral attack could include an action in trespass against the buyers in the execution sale. Thus, Appellant is wrong in stating that "Texas law allowed his property to be taken from him and denied him all recourse to forestall that deprivation." Appellant's brief at 8. Texas law allows Appellant to attack the execution against his property if the judgment was void, whether or not Appellant had a meritorious defense.

Finally, as a last line of defense under Texas law, Appellant has the ability to attack the seizure and sale of his property. This is the case regardless of whether the judgment was void. In fact, even if the judgment is found to be valid from its inception, Appellant can attack the execution based on defects in the execution procedure or the price obtained at the execution sale. *Taul* v. *W.B. Wright*, 45 Tex. 388 (1876); *Remley* v. *Kleypas*, 645 F. Supp. at 695; *Rio Delta Land Company* v. *Johnson*, 566 S.W.2d 710, 712 (Tex. Civ. App. — Corpus Christi 1978, writ ref'd n.r.e.); *Pantaze* v. *Slocum*, 518 S.W.2d 407, 409 (Tex. Civ. App. — Fort Worth 1974, writ ref'd n.r.e.); *Nance* v. *Curry*, 257 S.W.2d 847, 849-50 (Tex. Civ. App. — Dallas 1953, no writ); *Dodson* v. *Langford*, 26 S.W.2d 924, 925 (Tex. Civ. App. — Dallas 1930, no writ).

As a result, under Texas law, Appellant has a number of ways to attack this supposedly improper seizure of his property. In fact, as noted above, Appellant is currently challenging the validity of the seizure of his property in Cause No. 86-50755, *Rogelio Peralta and San Juana Peralta* v. *Paul SengNgan Chen, Mrs. Paul Seng-Ngan Chen, also known as Ms. Guo Bay-Le, Charles Hueter, Jr. and wife, Florence Inzez*

Hueter, in the 133rd Judicial District Court for Harris County, Texas.[3] In that proceeding, Appellant will have the opportunity to show that seizure of his property was void if he can show that the court which granted the default judgment lacked jurisdiction over Appellant. In the alternative, Appellant will have the opportunity to show that the execution sale itself was improper even apart from the judgment. It should be noted that in Cause No. 86-50755 Appellant also is attacking an earlier foreclosure sale of the same property. If the earlier foreclosure sale is upheld, then the issue of the execution sale will be moot since it will have deprived Appellant of nothing.

The meritorious defense requirement complained of arises only in the context of the equitable bill of review procedure which Appellant opted to utilize. The bill of review procedure relates only to the setting aside of the judgment and granting new trials. Denial of the bill of review does not automatically validate the execution sale of Appellant's property. As explained above, a void judgment can be ignored and any attempt to recover pursuant to a void judgment can be collaterally attacked or enjoined. There is no need to resort to a bill of review to attack the enforcement of a void judgment.

The meritorious defense requirement arose from a series of Texas cases holding that a bill of review determination to set aside a judgment and grant a new trial was interlocutory and unappealable. Accordingly, the court was then required to proceed with the new trial and not leave the matter unresolved. *Taylor, Knapp & Co.* v. *Fore*, 42 Tex. 256 (1875); *Bridgman* v. *Moore*, 206 S.W.2d 871 (Tex. Civ. App. — Beaumont 1947, writ ref'd n.r.e.); *Owens* v. *Foley*, 93 S.W. 1003 (Tex. Civ. App. 1906, writ ref'd).

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[3] A copy of Appellant's petition in that matter is attached to this brief as Appendix 1.

Since a bill of review court, in a single proceeding, has to dispose of the question of whether to grant a retrial and the issues to be raised in the retrial, it is natural to consider, as a preliminary question, whether a retrial has a chance to affect the outcome. In the limited context of this procedure, Texas courts have taken the position that there is no equitable reason to delete a judgment from the record and grant a new trial when the defendant admits that he has no meritorious defense and that if the suit were retried, judgment against him could be immediately reinstated on summary judgment. *Baker* v. *Goldsmith,* 582 S.W.2d 404, 408, 409 (Tex. 1979); *Alexander* v. *Hagedorn,* 148 Tex. 565, 226 S.W.2d 996, 1002 (1950).

Moreover, the meritorious defense requirement is not an onerous one. In a recent case, *The Moving Company* v. *Whitten,* 717 S.W.2d 117, 120 (Tex. App. — Houston [14th Dist.] 1986, writ ref'd n.r.e.), the court described this requirement as follows:

> A meritorious defense is one that, if proved, would cause a different result upon retrial of the case, although it need not be a totally opposite result. *Harlen* v. *Pfeffer,* [693 S.W.2d 543, 546 (Tex. App. — San Antonio 1985, no writ)]. For example, in this case any defense to a portion of appellee's damages might produce the different result of a lesser amount of damages. *Gardner* v. *Jones,* 570 S.W.2d 198, 201 (Tex. Civ. App. — Houston [1st Dist.] 1978, no writ). Additionally, a defendant against whom a default judgment has been rendered need not conclusively *prove* a meritorious defense to be entitled to a new trial, he need only *"set up"* such a defense. *Aero Mayflower Transit Co.* v. *Spoljaric,* 669 S.W.2d 158 (Tex. App. — Fort Worth 1984, writ dism'd). The facts of the meritorious defense may be set forth by affidavit or other competent evidence. *Ivy* v. *Carrell,* [407 S.W.2d 212 (Tex. 1966)].
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> In determining whether the defendant has "set up" a meritorious defense, only the legal sufficiency of the facts necessary to set up the defense may be contested by the plaintiff; the factual basis of defendant's meritorious defense may not. If the plaintiff can show the defendant has failed to allege facts supporting an element of its meritorious defense, then the motions may be properly overruled. In other words, once a meritorious defense has been set up, supported by evidence which prima facie entitled the defaulting defendant to a new trial, the new trial should not be denied upon consideration of contradictory testimony offered in resistance to the motion.

The *Moving Company* court went on to state:

> It has been said that the defendant's burden of setting up a meritorious defense is much like that of one who opposes a motion for summary judgment. The trial court, in ruling on a motion to set aside a default judgment is confined to a determination of whether there is a fact issue to be tried.

Id. at 120 n.2. *See Baker* v. *Goldsmith,* 582 S.W.2d at 409; *Swenson* v. *Swenson,* 466 S.W.2d 424, 426 (Tex. Civ. App. — Houston [1st Dist.] 1971, no writ).

Appellant, in his brief, refers to the bill of review procedure as having "summarily extirpated [Appellant's rights] with no process whatsoever." Appellant's brief at 10. This too is an obvious mischaracterization of what happened.

As to his attack on the judgment itself, Appellant was given the opportunity to present evidence or allegations that he had a defense. Had Appellant done so, and, assuming he could have shown lack of personal jurisdiction in the court granting the original judgment, the judgment would have been vacated and a new trial granted. *Baker* v. *Goldsmith,* 582 S.W.2d at 409. In the new trial, Appellee would have to litigate any disputed matters.

As to the execution sale, Appellant's rights have never been litigated and have not been extirpated, summarily or

otherwise. The bill of review procedure ruled on by the courts below did not relate to the validity of the execution sale, which Appellant currently is litigating in another proceeding.

Appellee does not dispute that Appellant has an interest in preventing his property from being seized without prior notice and as the result of an invalid judgment. But, as demonstrated above, Texas law provides Appellant with the ability to prevent this from happening, or to obtain redress if this does happen. If the judgment was void for want of jurisdiction at the time the seizure of Appellant's property occurred, then the seizure was invalid and impeachable, notwithstanding that the court below denied the petition for the bill of review.

(2) In a case on appeal, like this, the Court's review should be limited to the constitutionality of Rule 329b(f).

Appellant invoked this Court's appellate jurisdiction under 28 U.S.C. § 1257(2) on the pretext of challenging the constitutionality of Texas Rule of Civil Procedure 329b(f).

The question of whether the Fourteenth Amendment permits enforcement of an allegedly void judgment, however, goes far beyond the scope of Rule 329b(f). As discussed above, the Rule 329b(f) procedure did not relate to the execution sale of Appellant's property. Nor was the validity of the execution sale litigated in, or relied upon by, the courts below. Appellant has attempted to distract this Court's attention from Rule 329b(f) itself, by waving before this Court a graphic (and disputed) version of facts relating to the execution on his property — a matter which is still in the process of being litigated. This Court's review should be limited to the issue decided below: whether a state is required to set aside a default judgment where the defendant has no meritorious defense. The issue of whether the execution sale should be set aside is not within the scope of Rule 329b(f), was not litigated in, or decided by, the Court below, and is presently in the process of being litigated in another proceeding.

(3) Appellant failed to adequately raise in the state court proceedings his arguments relating to his "liberty" interests; such arguments are therefore barred at this late date.

Appellant's brief states:

> Mr. Peralta's liberty interest is similarly straightforward: he had a cognizable interest in protecting his "good name, reputation, honor [and] integrity," *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971) and this interest was impaired when Mr. Peralta became a judgment debtor on his own guarantee.

Appellant's brief at 9.

Thus, Appellant seems to be arguing that even if Rule 329b(f) does not affect his property, it unconstitutionally affects his "liberty," since by not allowing him to set aside the judgment, his "good name" is adversely affected. This liberty argument was not raised in the state courts when Appellant discussed his due process claim.

Since Appellant did not raise his alleged liberty interests before the Texas courts, those courts did not consider whether Appellant had a constitutionally protected liberty interest in protecting his good name.

This Court has held that it will not review issues not raised in, and definitely decided by, the state courts. *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973); *Street* v. *New York*, 394 U.S. 576, 582 (1969); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 104 (1944). In *Spector Motor*, this Court noted:

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is

that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted the federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law . . . Avoidances of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely keeps this time-honored canon of constitutional adjudication.

323 U.S. at 105

(4) There is not deprivation of liberty or property resulting from an unenforceable judgment sufficient to invoke the procedural protection of the due process clause.

As discussed in the preceding section, Appellant argues that even if Texas law gave him several procedures to prevent the judgment from improperly depriving him of his property, he still is harmed in an unconstitutional manner since his inability to have the judgment removed from the record harms his reputation.

In *Paul* v. *Davis*, 424 U.S. 693 (1976), however, this Court held that injury to reputation alone, even where inflicted by an officer of the state, does not result in a deprivation of any liberty or property and thus does not invoke the procedural protection of the due process clause. In *Paul* v. *Davis*, plaintiff Davis was suing as a result of the circulation by the Louisville police of a flyer which identified him as a shoplifter, based on an arrest prior to the circulation. The shoplifting charges were subsequently dismissed. The Court in distinguishing the *Paul* v. *Davis* case from other cases, including *Constantineau*, said:

> In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It

> was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in those decisions . . . [H]is interest in reputation is simply one of a number which the State may protect against injury . . . Any harm to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law nor has it worked any change of respondent's status theretofore recognized under the State's laws. For these reasons we hold that the interest in reputation asserted in this case is neither "liberty" nor "property" guaranteed against state deprivation without due process of law.

Paul v. *Davis*, 424 U.S. at 712-13.

In *Paul* v. *Davis*, this Court specifically distinguished and clarified *Constantineau*, which had been relied upon by the Court of Appeals in finding that Davis had a right to due process protection of his reputation. In *Constantineau*, which Appellant relies upon, the state of Wisconsin, without procedural safeguards "posted" certain individuals as problem drinkers, with the result that it was a misdemeanor to sell or give liquor to such posted persons. The *Paul* v. *Davis* Court, explaining certain ambiguous language in *Constantineau*, stated:

> We think the italicized language in the last sentence quoted, "because of what the government is doing to him" referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law — the right to purchase or obtain liquor in common with the rest of the citizenry. "Posting," therefore, significantly altered her status as a matter of state law, and it was that alteration

> of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards. The "stigma" resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of any "liberty" protected by the procedural guarantees of the Fourteenth Amendment.

Paul v. *Davis*, 424 U.S. at 708-09.

There are several things to be considered in applying *Constantineau* as interpreted by *Paul* v. *Davis* to the instant case. In both *Constantineau* and *Paul* v. *Davis*, the defamatory nature of the action was far greater than in the instant case. Constantineau was being labeled a problem drinker, Davis a shoplifter. In the instant case, the "defamation" is the existence on the record of a non-criminal judgment for a debt which the Appellant admits owing. Secondly, neither Constantineau nor Davis was afforded any procedural opportunity to challenge the characterization to which they object. In the instant case, Appellant was provided the opportunity to demonstrate that he had a defense to the debt. Had he raised any defense, he would have been given a new trial.

As *Paul* v. *Davis* made clear, it is the "change of status" not the label itself which gave rise to the liberty interest. In the instant case, the judgment itself did not give rise to any change in Appellant's status. Further, Texas law affords Appellant with ample procedure to attack any enforcement under the judgment, if he can show the judgment to have been void or the execution sale improper due to failure to give him requisite notice. Thus Appellant has no constitutionally protected liberty interest which was violated by Rule 329b(f), as applied to him.

(5) Applying the three criteria set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), demonstrates that Rule 329b(f) does not violate due process requirements.

In *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976), this Court stated that "due process is flexible and calls for such procedural protections as the particular situation demands." This Court then established a three-pronged test to determine the specific dictates of due process in particular situations.

The first prong is a consideration of the private interest affected by the official action. The "meritorious defense" requirement becomes an impediment to Appellant only because he admits that he has no defense. Thus Appellant's "interest" is in erasing from the record a judgment which, if found enforceable, would require Appellant to pay a debt which he admittedly owes and which, if set aside, could admittedly be reinstituted by summary judgment. Appellant argues that if he had notice of the suit, he could have impleaded the person whose debt he guaranteed, attempted to work out a settlement or paid the debt. Although Appellant has lost the opportunity to implead, he can bring an independent suit against the debtor. And although Appellant could have tried to settle the case and avoid entry of judgment, he had no right to do so if Appellee wished to press the suit to its conclusion. Given the lack of a meritorious defense, pressing the suit to a conclusion would result in a judgment against Appellant. Thus the only concrete result of the Appellant's inability to succeed in the bill of review is that the public record contains a judgment against him for a debt which he admits he owes. The other private interest involved is Appellee's interest in obtaining payment of an admittedly valid debt without the expense and delay of a retrial where the outcome is inevitable.

The second prong of the test in *Mathews* v. *Eldridge*, is a consideration of the risk of erroneous deprivation of the private interest involved and the probable value of any additional or substitute procedural safeguards. Here there is no risk of erroneous deprivation. Appellant owes the debt, he admits owing the debt, and he does not even contend that he has a defense. Other safeguards would have no value. Further, the meritorious defense requirement is not onerous. As discussed above, it merely requires the defendant to set up a defense sufficient to prevent a summary judgment in favor of the plaintiff. Since the present case involved a summary judgment proceeding, the burden of proof was on Appellee. Appellant merely had to raise a fact issue. This burden is not oppressive or constitutionally infirm. Again, the only effect of requiring Appellee to reinstitute its suit would be to cost Appellee more delay and legal fees.

The third prong of the *Mathews* v. *Eldridge* test is a consideration of the government's interest and the fiscal and administrative burdens of additional safeguards. In the present case the result would be a new lawsuit with a foregone conclusion. Setting aside a judgment where there is no defense has been held by Texas courts to be "a vain act and a trespass on the time of the court." *McEwen* v. *Harrison*, 162 Tex. 125, 345 S.W.2d 707, 710 (1961). The Texas Supreme Court has also said of the meritorious defense prerequisite:

> This preliminary showing is essential in order to assure the court that valuable judicial resources will not be wasted by conducting a spurious "full-blown" examination of the merits.
>
> . . . [O]nce a judgment has become final, it must be accorded a measure of respect or litigation would tend to become endless.

See Baker v. *Goldsmith, supra* at 408-09.

CONCLUSION

In arguing this case to the Texas courts, Appellant mixed together and confused a number of separate issues. Appellant seems to be trying to continue this confusion by continually shifting from the issue of whether the default judgment should be set aside to the issue of the validity of the execution sale. The bill of review procedure in Rule 329b(f) is a portion of a provision primarily relating to retrials. In this context, it is natural for the courts, before granting a retrial to ask the party seeking the retrial to make some showing that there is a factual dispute to be retried. In the case of Rule 329b(f), the required showing is the minimum amount necessary to defeat a summary judgment motion by the opposing party.

Rule 329b(f) does not relate to the enforceability of a judgment *if* the judgment or the enforcement is found to have been void. Texas law is clear that the judgments which are void for lack of jurisdiction are unenforceable and may be collaterally attacked. Appellant further overstates his case by ignoring that Texas law also requires notice before the seizure and sale of property. Therefore, if Appellant can show his property was seized without such notice, or was sold at an inadequate price, he can attack the sale.

The fact that attacking the sale of Appellant's property and Rule 329b(f) are unrelated leaves Appellant without any damage which falls within the scope of this appeal. Appellant seeks to circumvent this embarrassing lack, by raising, for the first time, the argument that his inability to expunge the default judgment from the record is, in itself, a violation of his "liberty" interest in his good name. This argument must fail, however. First, it was not raised before the Texas courts. Second, this Court has held that there is not liberty or property interest in reputation alone sufficient to invoke due process requirements.

When the balancing test mandated in *Mathews* v. *Eldridge* is applied, it is clear that the state's interest in finality of judgment and judicial economy, plus Appellee's interest in not having the payment of a valid debt further delayed, far outweigh Appellant's interest in having removed from the record a judgment for a sum admitted to be due, especially since Appellant has redress under Texas law for enforcement of the judgment, if either the judgment or the enforcement was in fact invalid.

Respectfully submitted,

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APPENDIX I

I-1

No. 86-50755

ROGELIO PERALTA AND SAN JUANA PERALTA VS. MR. PAUL SENG-NGAN CHEN, MRS. PAUL SENG-NGAN CHEN, ALSO KNOWN AS MS. GUO-BAY-LE, CHARLES J. HUETER, JR. AND WIFE FLORENCE INEZ HUETER	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 133RD JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

To the Honorable Judge of Said Court:

COMES NOW, Rogelio Peralta and San Juana Peralta, Plaintiffs, complaining of Mr. Paul Seng-Ngan Chen; Mrs. Paul Seng-Ngan Chen, also known as Mrs. Guo-Bay-Le; Charles J. Hueter, Jr., and wife Florence Inez Hueter, and for cause of action would show as follows:

I.

Rogelio and San Juana Peralta, Plaintiffs, are individuals residing in Houston, Harris County, Texas. Defendants Mr. Paul Seng-Ngan Chen and Mrs. Paul Seng-Ngan Chen, also known as Mrs. Guo-Bay-Le, are individuals who may be served with process at 8214 Winding Meadow, Houston, Harris County, Texas, 77040. Defendant Charles J. Hueter, Jr. and wife, Florence Inez Hueter are individuals, and may be served with process at 20507 Keats Court, Humble, Texas 77338.

II.

At all times relevant, Plaintiffs were, and are, the owners in fee simple of a parcel of real property and of all improvements on that property, more specifically described in Exhibit "A" hereto and incorporated herein the same as if fully copied and set forth in length (hereinafter "the real property").

III.

On or about October 18, 1978, Plaintiffs purchased the real property, recording title by warranty deed from Charles J. Hueter, Jr., and wife, Florence Inez Hueter, by a Warranty Deed with retained vendor's lien, a copy of which is attached hereto and made a part hereof as Exhibit "A," and Deed of Trust from Plaintiffs to Malcolm S. Morris, trustee, to secure a promissory note in the principal sum of $40,000.00, payable to the order of Charles J. Hueter, Jr. and Florence Inez Hueter, which deed of trust is recorded under file number F818188, Film Code Number 109-98-0408 of the real property records of Harris County, Texas.

Plaintiffs took possession of the real property and operated a business thereon and remained in open, visible and continuous possession until on or about February 3, 1984, when Plaintiffs were forcibly dispossessed of the real property by a Harris County deputy constable, as more particularly described herein. Plaintiffs had, at all times, made payments as required under the promissory note and deed of trust or as accepted by Defendants Hueter until all payments due were paid. On or about October 18, 1983, at the time Plaintiffs made their final payment and demanded a release of lien, they were informed that Defendants Hueter had allegedly foreclosed on the real property, allegedly terminating Plaintiffs' interest in the real property.

Only afterwards, on or about November 15, 1983, Malcolm S. Morris, as trustee, recorded a trustee's deed which recited a foreclosure sale on November 1, 1982. Said trustee's deed passes title to Mr. Paul Seng-Ngan Chen and Mrs. Paul Seng-Ngan Chen, also known as Mrs. Guo-Bay-Le, who also claim title to the real property by virtue of the purchase of all of Plaintiffs' right, title and interest to the real property at a constable's sale that occurred on or about March 1, 1983.

IV.

Plaintiffs would show that the alleged foreclosure sale on November 1, 1982, was wrongful, and in breach of the provisions of the Deed of Trust, in that:

1. Plaintiffs were not in default under the note or under their obligations as set out in the Deed of Trust;
2. Plaintiffs were not given notice of acceleration of the note as required by the Deed of Trust and the laws of the State of Texas; and
3. Plaintiffs were not given notice foreclosure as required by the Deed of Trust and the laws of the State of Texas.

As a result of the above described breach of the provisions of the Deed of Trust and wrongful foreclosure, Plaintiffs have been damaged in a sum in excess of the minimum jurisdictional limits of this Court, for which Plaintiffs now sue.

V.

Pleading in the alternative, without waiving the foregoing pleading, but incorporating the facts set forth above the same as if fully copied and set forth at length, Plaintiffs

would show that the alleged foreclosure sale that occurred on November 1, 1982, was void for the reasons stated in paragraph IV of this petition. Plaintiffs further would show that the execution sale that occurred on or about March 1, 1983, was void because the underlying judgment made the basis of said execution sale was rendered without due process on a void citation.

Thus, Plaintiffs were, and still are, entitled to ownership and possession of the real property. However, on or about February 3, 1984, Defendants Mr.and Mrs. Paul Seng-Ngan Chen, wrongfully took possession of the real property and now continue to withhold possession from Plaintiffs.

Defendants Mr. and Mrs. Paul Seng-Ngan Chen have used and occupied the above described premises under their unlawful possession for a period of approximately two (2) years prior to commencement of this suit. The reasonable rental value of said premises during such occupancy is approximately $80,000.00, in which amount Defendants Mr. and Mrs. Paul Seng-Ngan Chen are justly indebted to Plaintiffs by virtue of Defendants Mr. and Mrs. Paul Seng-Ngan Chen's unlawful possession. Although Plaintiffs have demanded payment of such rents, Defendants have failed and refused, and still fail and refuse to pay such rents, to Plaintiffs damage in the sum of $80,000.00, for which Plaintiffs now sue.

VI.

Pleading in the alternative, without waiving the foregoing pleading, but incorporating the facts set forth above the same as if fully copied and set forth at length, Plaintiffs would show that at all times relevant, they were entitled to possession and title to the real property. Plaintiffs further would show that all instruments by which Defendants Mr. and Mrs. Paul Seng-Ngan Chen took title to the real

property were void. Accordingly, the filing and recording of said instruments constitutes slander to the title of Plaintiffs for which Plaintiffs seek damages in a sum in excess of the minimum jurisdiction limits of this Court.

VII.

Pleading in the alternative, without waiving the foregoing pleading, but incorporating the facts set forth above the same as if fully copied and set forth at length, Plaintiffs would show that the Defendants conspired together, and perhaps with others, to wrongfully deprive Plaintiffs of ownership and title to the real property. Defendants' actions were intentional, fraudulent, and without legal basis or justification. As a result of Defendants' common law fraud and conspiracy, Plaintiffs have been damaged in a sum in excess of the minimum jurisdictional limits of this Court, for which Plaintiffs now sue.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendants be cited to appear and answer herein, and that on final trial, Plaintiffs have:

1. Judgment for title to the real property;
2. Judgment ordering that the real property records of Harris County, Texas, be expunged of any deeds or other instruments purporting to vest title to the real property in Defendants Chen or Defendants Hueter;
3. Judgment against Defendants Charles J. Hueter, Jr., Florence Inez Hueter, jointly and severally, for a sum in excess of the minimum jurisdictional limits of this Court for Defendants Hueter's wrongful foreclosure;
4. Judgment against Defendants Chen, jointly and severally, for at least $80,000.00 in rents and in an amount exceeding the minimum jurisdictional limits of this Court as damages to title;

5. Judgment against all Defendants, jointly and severally, for Plaintiffs' actual damages sustained as a result of Defendants' conspiracy and common law fraud;
6. Judgment against all Defendants, jointly and severally, for exemplary damages in a sum in excess of the minimum jurisdictional limits of this Court;
7. Reasonable attorney's fees;
8. Prejudgment interest at the legal rate from November 1, 1982 until judgment;
9. Post judgment interest at the highest legal rate until paid;
10. Costs of court; and
11. Such other and further relief, at law or in equity to which Plaintiffs may be justly entitled.

Respectfully submitted,

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Exhibit A (Warranty Deed from Charles J. Hueter to Rogelio Peralta) is omitted.

REPLY BRIEF

No. 86-1430

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

R. "ROY" PERALTA,
Appellant,

v.

HEIGHTS MEDICAL CENTER, INC.
d/b/a HEIGHTS HOSPITAL and
MR. AND MRS. PAUL SENG-NGAN CHEN

On Appeal from the Supreme Court of Texas

REPLY BRIEF FOR APPELLANT

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On Appeal from the Supreme Court of Texas

REPLY BRIEF FOR APPELLANT

ARGUMENT AND AUTHORITIES

In Mr. Peralta's opening brief we argued that a void judgment, whether void for want of personal jurisdiction, for lack of notice and an opportunity to respond, or for gross procedural infirmities amounting to a denial of due process, was a legal nullity entitled to no force or effect. Neither Appellee Heights Medical Center, Inc. nor *Amicus* State of Texas disputes this. *See* Appellee's Br. at 8-9; *Amicus*' Br. at 4. The State of Texas argues, nonetheless, that the bill of review procedure embodied in Tex. R. Civ. P. 329b(f) is constitutional, because, even though Mr. Peralta cannot vacate that judgment, he can successfully enjoin its enforcement through collateral attacks. The State of Texas cites to no case law for this proposition. Heights Medical Center, Inc., in addition to pressing this same argument, also contends

that this Court's decision in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) somehow allows Texas to refuse to vacate the defective default judgment entered in this case. These arguments are without merit.[1]

1. The Putative Availability of Collateral Means to Attack the Judgment Does Not Render Rule 329b(f) Constitutional

In Texas, a bill of review is the only means by which a party in Mr. Peralta's shoes can seek to vacate a default judgment which is not void on its face. The State of Texas acknowledges this, *Amicus* Br. at 6, and Heights Medical Center, Inc. concedes that this is "technically correct." Appellee's Br. at 8. Both contend, however, that the statutory restriction imposed by Rule 329b(f) limiting this avenue of relief only to those with meritorious defenses is constitutional. They argue that the availability of collateral means by which to attack a judgment obtained without due process somehow sanctions the inability to vacate that judgment directly under Rule 329b(f). This argument is flawed on several levels.

Foremost, this argument fails because it presupposes that no protectable interest is implicated by the entry of a judgment: according to the State of Texas, it is only upon the execution of a judgment that the guarantees of the Fourteenth Amendment come into play. This, of course, is plainly not so. Certainly it cannot be disputed that by being made subject to a judgment in a forum to which he has not properly been called to answer, Mr. Peralta's liberty is infringed. *Insurance Corp. of Ireland Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985).[2]

Similarly, this argument is flawed because there are several significant changes in Mr. Peralta's status occasioned by the entry of the judgment against him. As we noted in our opening brief, Mr. Peralta's "good name, reputation, honor, [and] integrity" were tarnished. *Wis-*

---

[1] We must, for the sake of clarity, respond to certain peripheral points raised in Heights Medical Center Inc.'s brief. They state that the record does not show whether notice of the judgment was sent to Mr. Peralta by the court clerk. To the contrary, the record lacks the required docket entry reflecting service of the judgment in accordance with Tex. R. Civ. P. 239a. Similarly, Heights Medical Center, Inc. states that Mr. Peralta attempted to present a meritorious defense at the trial court, but abandoned that argument on appeal. Mr. Peralta argued below, and still maintains, that Heights Medical Center, Inc.'s suit on the debt was barred by the applicable statute of limitations. *See* Tex. Civ. Prac. and Rem. Code § 16.004(a)(3). Mr. Peralta does not now nor has he ever contested the establishment or nonpayment of the debt. Finally, it is noteworthy that while Heights Medical Center, Inc. now argues that "[t]he issue of whether the original default judgment was in fact void and the validity of any enforcement of that judgment was not decided by the courts below," Appellee's Br. at 5, in the trial court Heights Medical Center, Inc. moved to join appellees Mr. and Mrs. Paul Seng-Ngan Chen (the purchasers at the constable's sale) contending that:

> Pursuant to [a] judgment, certain real property of Petitioner Peralta was executed upon in a foreclosure sale. Petitioner seeks cancellation of that sale as part of its relief in this action. This court cannot properly adjudicate the property interest of the foreclosure purchaser and record owner of that real property . . . without having him before the court.

Moreover, the constitutional validity of the original judgment was briefed to and decided by the Court of Appeals.

[2] Heights Medical Center, Inc. erroneously states that we failed to raise our liberty interest argument below. In the trial court Mr. Peralta sought, among other things, the vacation of the default judgment and the expungement of the abstract of judgment. This is precisely the relief necessary to protect Mr. Peralta's liberty interest. In any event, this Court will consider a question of law not pressed below when failing to do so would work an injustice, *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941), and when the circumstances so justify. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). The question of whether Mr. Peralta's liberty interests have been implicated is purely one of law, and given the lower court's disposition of this case, not one for which further development of the record would have proved meaningful.

consin v. *Constantineau*, 400 U.S. 433, 437 (1971).[3] Moreover, because the County Clerk of Harris County is obligated to record a properly authenticated Abstract of Judgment, Texas Real Property Code §§ 11.004(a)(1), 52.004(a), credit reporting agencies are allowed to report Mr. Peralta as a judgment debtor, thus altering his previous status.[4] Because the judgment became final and unappealable before Mr. Peralta learned of the judgment, he also irretrievably lost the opportunity to implead the former employee whose hospital debt he guaranteed. These interests are of the variety "which are difficult of definition but are nonetheless comprehended within the meaning of either 'liberty' or 'property' as meant by the due process clause." *Paul* v. *Davis*, 424 U.S. at 711.

Finally, the notion that property is not taken upon the entry of a judgment is ill-founded. Perhaps this argument would have some merit if the Fourteenth Amendment protected only the actual possession of tangible property. It is long past the time, however, when possession in the physical sense is the *sine qua non* of property. *See Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1934); *Armstrong* v. *United States*, 364 U.S. 40 (1960). Rather, the test is whether the individual has a legitimate claim of entitlement to a thing of value, *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), and no one could dispute that, after the entry of the default judgment, Heights Medical Center, Inc.

[3] Heights Medical Center, Inc.'s reliance on *Paul* v. *Davis*, 424 U.S. 693 (1976) is misplaced. This Court in *Paul* v. *Davis* found that the actions of two state officials in defaming an individual did not of themselves constitute a deprivation of liberty. Mr. Peralta, of course, suffered more than simply an insult to his name and reputation: most significantly, through state action, Mr. Peralta became a judgment debtor, with all the attendant disabilities.

[4] The Fair Credit Reporting Act, 15 U.S.C. § 1681(c)(2), allows credit reporting agencies to report judgments up to seven years old, but prohibits the reporting of older judgments out of "respect for the consumer's right of privacy." 15 U.S.C. § 1681(a)(4).

had an enforceable claim of entitlement to something which immediately before had been Mr. Peralta's. Indeed, more than simply transforming a joint debt into a single judgment, and thus imbuing the debt with the authority of state law, Heights Medical Center, Inc. obtained a judgment for the amount of the debt plus attorney fees and costs. Even if it might be argued that Mr. Peralta lost no property in the transformation of his joint debt into a single judgment and the attendant loss of the opportunity to implead his former employee, it cannot be gainsaid that the entry of judgment for costs and attorney fees took from Mr. Peralta and gave to Heights Medical Center, Inc. a claim of entitlement to a certain sum of money. This taking of property, occasioned by state action, is a cognizable deprivation under the Fourteenth Amendment. *Parrat* v. *Taylor*, 451 U.S. 527, 536 (1981).

The argument that alternative collateral remedies sanction Rule 329b(f)'s restriction on Mr. Peralta's right to vacate the void judgment is faulty not only in that it presupposes that no protectable interest is implicated until the time of execution, but as well because it presumes an equivalence between the bill of review proceeding denied Mr. Peralta and the collateral methods of attacking the judgment.[5] A bill of review is a hybrid

[5] The Supreme Court of Texas has distinguished a direct attack from a collateral attack as follows:

> A direct attack on a judgment is an attempt to amend, correct, reform, vacate, or enjoin the execution of the same in a proceeding instituted for that purpose, such as a motion for rehearing, an appeal, some form of writ of error, a bill of review, an injunction to restrain its execution, etc. A collateral attack on a judgment is an attempt to avoid its binding force in a proceeding not instituted for one of the purposes aforesaid as . . . where, in a suit to try title to property, a judgment is offered as a link in the chain of title, and the adversary attempts to avoid its effect . . .

Crawford v. *McDonald*, 33 S.W. 325, 327 (Tex. 1895). *See also Pena* v. *Bourland*, 72 F. Supp. 290, 294 (S.D. Tex. 1947).

proceeding which blurs the distinction between a direct attack and a collateral attack. Like a collateral attack, it is a suit independent of the original suit in which judgment was rendered. *Baker* v. *Goldsmith*, 582 S.W. 2d 404, 406 (Tex. 1979). Yet a bill of review is unique in that it is the only proceeding through which to attack a default judgment which recites regular service on its face. *Joiner* v. *Vasquez*, 632 F.2d S.W.2d 755, 757 (Tex. Civ. App. — Dallas 1981), *cert. denied*, 464 U.S. 981 (1983).

A collateral attack is unavailing if the judgment recites the necessary jurisdictional facts, for such a judgment "can only be assailed by a direct proceeding," and "not even the remainder of the record . . . will be considered in contradiction thereof, even though such evidence would show that jurisdiction was not, in fact, acquired." *Remley* v. *Kleypas*, 645 F.Supp. 690, 693 (S.D. Tex. 1986); *Levy* v. *Roper*, 256 S.W. 251 (Tex. 1923). Yet these are precisely the facts here: the judgment cites that Mr. Peralta was "legally and regularly cited according to law and service being in all things complete," yet the citation, as all concede, shows that it was void. Mr. Peralta could not, through any collateral attack, rid himself of this void judgment or prevent its execution.[6]

Finally, because Mr. Peralta's real property has already been seized and sold, the sole collateral proceeding available to him would be a trespass to try title action. Tex. Prop. Code § 22.01; *Standard Oil Co. of Texas* v.

[6] Heights Medical Center, Inc. cites *Pena* v. *Bourland*, 72 F. Supp. at 294, for the proposition that Mr. Peralta has a remedy which satisfies due process; namely an injunction restraining future execution on the judgment. Yet this issue was not even addressed in *Pena*. This case is apposite, however, for in *Pena*, a trespass to try title suit similar to the one Mr. Peralta has been forced to bring in another action, the court found that the recitation of proper service in the judgment was entitled to "absolute verity" and as a result "such judgment cannot be attacked collaterally." *Id.* at 295.

Marshall, 265 F.2d 46, 50 (5th Cir.), *cert. denied*, 361 U.S. 915 (1959). In such an action, Mr. Peralta could not rely merely upon proving that the purchaser at the foreclosure sale took title as the result of a void judgment. Rather, his burden would be to prove his title "good as against the entire world" and he could not rely upon the "infirmity of his adversary's title" to do so. *Reinhardt* v. *North*, 507 S.W.2d 589, 591 (Tex. Civ. App. — Waco 1974, *writ ref'd n.r.e.*) Mr. Peralta would be shouldered with this burden solely as a result of a void judgment rendered by a court without personal jurisdiction. This is a fundamental denial of due process under the Fourteenth Amendment. *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 483 (1982); *Armstrong* v. *Manzo*, 380 U.S. 545, 551 (1965).

2. *Mathews* v. *Eldridge* Analysis Is Inapposite Here

Heights Medical Center, Inc. also seeks to defend the judgment below by suggesting that application of the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319, somehow vindicates Texas' imposition of a meritorious defense requirement as a prerequisite to vacating a void default judgment. This balancing analysis, however, is wholly inappropriate in the context of judicial action between private parties.

In *Mathews*, this Court enunciated the standard for determining "what process is due" in the context of deprivations of certain government benefits. The question this Court addressed was what type of governmental benefits were of such stature that they could be extinguished by process short of a full adversary proceeding. As the Court held:

> The ultimate balance involves a determination as to when, under our constitutional system, judicial type procedures must be imposed upon administrative action to assure fairness.

Mathews v. *Eldridge*, 424 U.S. at 348. There is, of course, no administrative action involved in this suit. This is a suit between private parties which, under our constitutional system, is adjudicated through the judicial process. *Thomas* v. *Union Carbide Agriculture Products Co.*, 471 U.S. 568, 578 (1985).

Heights Medical Center, Inc. concedes that a judgment entered without personal jurisdiction is void, but it contends that such a judgment would not be in derogation of the Fourteenth Amendment if there were sufficient post judgment process. Invoking "flexibility of due process," it argues that this constitutional deprivation may be excused, since it contends that Mr. Peralta would have fared no better had he been accorded the process the Constitution required. The suggestion that this or any Court can turn on and off the imperatives of the Constitution because in some case someone may argue that it is facile to do so is unsettling and, fortunately, not the law of the land. *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978).

While we submit that the balancing analysis of *Mathews* is inappropriate, it is ironic how much greater protection Eldridge enjoyed than did Mr. Peralta. Eldridge submitted himself to the system of administrative remedies provided under the Social Security Act by applying for and accepting benefits under that Act. Prior to the deprivation of his property, the administrator of the state agency: had sent him a questionnaire, which he completed and returned to the agency; had corresponded with his doctor regarding his status; had notified him of the preliminary determination to change his status; had requested additional information which might change the decision, which Eldridge provided; and had made a final determination that he was not disabled. Thereafter the state agency forwarded to the Social Security Administration its determination. The Social Security Administration then made a separate determination that it would accept the change in status from the state agency; sent notice to Eldridge of its determination in advance of terminating his benefits; and advised him of his rights to seek reconsideration of the termination of benefits within six months.

Mr. Peralta, on the other hand, never submitted himself to the jurisdiction of the court; was not notified of the institution of the lawsuit against him; was not notified of the entry of the judgment against him; was not notified before his property had been executed upon; and did not discover he had had his property taken until after the time to appeal the default judgment had expired. By arguing on these undisputed facts that Mr. Peralta may legitimately be precluded from vacating the judgment against him, Heights Medical Center, Inc. seeks not to balance, but instead to turn the Constitution on its head.

CONCLUSION

In *Armstrong* v. *Manzo*, 380 U.S. 545, this Court considered a Texas court holding that the constitutional infirmity occasioned by failing to provide a party notice was cured by providing a hearing on that party's motion to set aside the judgment. This Court held:

> A fundamental requirement of due process is "the opportunity to be heard." It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored petitioner to the position he would have occupied had due process of law been accorded him in the first place. His motion should have been granted.

Id., 380 U.S. at 552, *quoting Grannis* v. *Ordean*, 234 U.S. 385, 394 (1954). So, too, should Mr. Peralta's motion to

vacate the judgment have been granted. Texas' rule requiring the presentation of a meritorious defense as a condition precedent to setting aside a judgment obtained without due process violates the Fourteenth Amendment and this Court should so hold.

For the foregoing reasons, and for those reasons set forth in our earlier submissions, the decision of the court below should be reversed and judgment entered in favor of Mr. Peralta.

Respectfully submitted,

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November, 1987

AMICUS CURIAE

BRIEF

(6)

No. 86-1430

In The
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October Term, 1987

R. "ROY" PERALTA,

Appellant,

v.

HEIGHTS MEDICAL CENTER, INC.
d/b/a HEIGHTS HOSPITAL AND
MR. AND MRS. PAUL SENG-NGAN CHEN

Appellees.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

AMICUS CURIAE BRIEF FOR THE STATE OF TEXAS

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

AMICUS CURIAE BRIEF FOR THE STATE OF TEXAS

INTEREST OF AMICUS

The Attorney General of the *Amicus Curiae* State of Texas sponsors this brief, pursuant to Rule 36.4 of the Rules of the Supreme Court, to clarify the procedural framework of Texas law for setting aside default judgments.

STATEMENT OF THE CASE

Appellant-Peralta,[1] on July 26, 1981, guaranteed a $5,000 hospital debt incurred by one of his employees. *See* Appellant's Brief at 4. In February 1982, appellee-Medical Center filed a suit on the debt in a Texas district court. *Id.* Pursuant to TEX. R. CIV. P. 101, appellee-Medical Center "obtained a citation and directed it to the sheriff to serve Mr. Peralta at his place of business." Appellant's Brief at 4. Appellant-Peralta was not served within the 90 day period as required by Rule 101 and the record shows that the citation was outdated when served. Appellant-Peralta denies "ever receiving the citation." Appellant's Brief at 4. Appellee-Medical Center concedes outdated service. *See* Appellees' Motion to Dismiss at 2.

On June 21, 1984, appellant-Peralta brought a bill of review in the district court which entered the default judgment.[2] The court granted appellee-Medical Center's motion for summary judgment on the ground that appellant-Peralta could not prove a meritorious defense as required by Texas case law construing TEX. R. CIV. P. 329b(f). Appellant-Peralta concedes that he has no meritorious defense to the underlying action as is required for a bill of review.

On July 3, 1986, the Court of Appeals for the First Supreme Judicial District of Texas affirmed the trial court's entry of the summary judgment. The Texas Supreme Court refused to review the Court of Appeals' decision and appeal followed to this Court.

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1 Throughout this brief appellant will be referred to as appellant-Peralta and appellee will be referred to as appellee-Medical Center.

2 Appellant-Peralta has filed another suit attacking the execution and foreclosure sales on his property. Apparently, the property appellant-Peralta claims ownership in was bought at a foreclosure sale on November 1, 1982, and the people who repurchased it at the execution sale did so only to clear their title. *See Peralta v. Chen*, No. 86-50755 (Dist. Ct. of Harris County, 133rd Judicial Dist. of Texas). *See also* Appendix 1 of Appellees' Brief.

SUMMARY OF ARGUMENT

Appellant-Peralta's attack on Texas' bill of review procedure is misplaced. Texas' procedural scheme for overturning default judgments guarantees the due process rights of all litigants. Appellant-Peralta also claims that Texas law requires proof of a meritorious defense by a bill of review in order to set aside a void judgment; this is incorrect. A void default judgment may be set aside collaterally and a showing of a meritorious defense is not required. Appellant-Peralta failed to utilize a Texas procedure which is still available to him: a collateral attack on a void default judgment. This Court should dismiss the appeal and allow appellant-Peralta to attack the void judgment in the Texas courts.

ARGUMENT

I. APPELLANT-PERALTA FAILED TO COLLATERALLY ATTACK THE VOID JUDGMENT IN THIS CASE

A. The Default Judgment Rendered In This Case Is Void On Its Face

A default judgment is void when it appears affirmatively on the face of the judgment or in the record that the court "had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act as a court." *Browning v. Placke*, 698 S.W. 2d 362, 363 (Tex. 1985) (citations omitted). "Service [of citation outside of the 90 day period as required in Rule 101 renders a judgment] void on its face; the trial court [does] not acquire jurisdiction of [the defendant], and he is not required to answer the suit." Kem v. Krueger, 626 S.W.2d 143, 144 (Tex. App. --Fort Worth 1981, no writ). Appellant-Peralta was not required to answer this suit because the default judgment was void on its face.

B. The Default Judgment Rendered In This Case May Still Be Attacked Collaterally Without Proof Of A Meritorious Defense

When a party properly shows that a judgment is void he may attack it collaterally without resort to a direct attack or proof of a meritorious defense. *See Austin Independent School District v. Sierra Club*, 495 S.W.2d 878, 881 (Tex. 1973). A void judgment is "a dead limb upon the judicial tree, which may be chopped off at any time, capable of bearing no fruit to plaintiff, but constituting a constant menace to [the] defendant." *Commander v. Bryan*, 123 S.W.2d 1008, 1015 (Tex. Civ. App. --Fort Worth 1938, no writ). Appellant-Peralta may still attack the void judgment collaterally.

II. POST-JUDGMENT REMEDIES FOR VOIDABLE JUDGMENTS IN TEXAS ADEQUATELY PROTECT THE RIGHTS OF LITIGANTS

A. Post-Judgment Remedies For Voidable Judgments In Texas

"All errors other than jurisdictional deficiencies render the judgment merely voidable and . . . must be corrected" by four procedurally distinct mechanisms spanning a post-judgment time period of thirty days to four years: a motion for new trial, a regular appeal to the court of appeals, a writ of error appeal and a bill of review. *Browning, supra,* at 362. *See generally* Pohl and Hittner, *Judgments By Default In Texas*, 37 Sw. L.J. 421, 441-455 (1983) [hereinafter Pohl]. Although it is outside the scope of this brief to give a detailed analysis of all of these procedures a succinct explanation of each is necessary in order to paint a complete picture of post-judgment remedies in Texas. Texas law provides considerable protections to defendants interested in preserving their legal rights.

1. A Motion For New Trial

Within thirty days after a final judgment is signed a defendant may file a motion for new trial or one or more amended motions for new trial. TEX. R. CIV. P. 329b (a) & (b). A default judgment will be set aside if the defendant proves: (1) that the failure to answer was not intentional, (2) that the failure to answer was not the result of conscious indifference, (3) that the failure to answer was due to an accident or mistake, (4) that the defendant has a meritorious defense, and (5) that granting defendant's motion would not otherwise cause delay or injury to the plaintiff. *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex 388, 133 S.W.2d 124, 126 (1939). A defendant must set up a meritorious defense only by showing that the factual basis for the defense would alter the outcome of the case on retrial. *See generally City of Ft. Worth v. Gause*, 129 Tex. 25, 101 S.W.2d 221 (1937). The existence of meritorious defenses, at this stage, are liberally construed. *Commercial Credit Corp. v. Smith*, 143 Tex. 612, 187 S.W.2d. 363 (1945). When a motion for new trial is granted a new and complete judgment is entered, entirely setting aside the prior judgment.

2. A Regular Appeal

A party against whom a default judgment has been entered may pursue an appeal to a court of appeals within 30 days after the judgment is signed or within 90 days after it is signed if a timely motion for new trial is filed by any party. TEX. R. APP. P. 41(a). A further appeal may be pursued to the Texas Supreme Court upon writ of error filed with the court of appeals within 30 days after overruling of the last timely motion for rehearing. TEX. R. APP. P. 130. The appellate court has the broad authority to review the entire record as a whole including any and all parts which shed light on the problem. *Meyerland Community Improvement Association v. Temple*, 700

S.W.2d 263 (Tex. App. --Houston [1st Dist.] 1985, writ ref'd. n.r.e.).

3. An Appeal By Writ Of Error

Relief by writ of error directly attacking a default judgment to a court of appeals "may be taken at any time within six months after the date the final judgment is entered." TEX. CIV. PRAC. & REM. CODE § 51.013 (Vernon 1986). *See* TEX. CIV. PRAC. & REM. CODE § 51.012 (Vernon 1986) (granting an appeal by writ of error from a final judgment of a district or county court); TEX. P. APP. P. 45. A writ of error allows the appellate court to review the entire case exactly as it would in a regular appeal. *Gunn v. Cavanaugh*, 391 S.W.2d 723, 724 (Tex. 1965). A writ of error is available to those: (1) who were parties [of record] to the trial court suit but did not participate in the actual trial of the case (the degree of participation is *de minimis*), and (2) if the invalidity of the judgment appears on the face of the record. *Gunn v. Cavanaugh*, 391 S.W.2d at 724; Pohl at 451-452. The validity of the judgment by reference to an error on the face of the record is liberally constructed, Pohl at 453, and includes a review of the entire file such as the transcript and the statement of facts. *See Roe v. Doe*, 607 S.W.2d 602, 603 (Tex. Civ. App. --Eastland 1980, no writ).

4. A Bill Of Review

Once the time for all of the prior procedures have elapsed the only remaining way to directly attack a voidable default judgment is through a bill of review. A party has four years to file a bill of review. *See* TEX. CIV. PRAC. & REM. CODE § 16.051 (Vernon 1986). "A bill of review is an independent action [that is, a new suit in which the entire case is opened on the merits] of an equitable nature brought by a party to the former action and seeking to set aside a judgment therein which is not void on the face of the record . . . ." 4 R. MCDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 18.24 (rev. 1984) [hereinafter

MCDONALD]. Texas courts, in balancing competing interests, have concluded that the need for finality to judgments compels that bills of review should not be easily granted. *Alexander v. Hagedorn*, 226 S.W.2d 996, 998 (Tex. 1950)

An applicant seeking to set aside a default judgment via a bill of review "must allege and prove: (1) a meritorious defense to the cause of action alleged to support the judgment, (2) which he was prevented from making by the fraud, accident or wrongful act of the opposite party, (3) unmixed with any fault or negligence of his own." *Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240, 243 (Tex. 1974). "A prima facie meritorious defense is made out when it is determined that the complainant's defense is not barred as a matter of law and that he will be entitled to judgment on retrial if no evidence to the contrary is offered." *Baker v. Goldsmith*, 582 S.W.2d 404, 408-409 (Tex. 1979).[3]

5. Injunctive Relief Is Available To Protect Property During All Attacks On A Default Judgment

At the time of filing any of these procedures a litigant should also seek injunctive relief "from the original trial court against execution on the judgment . . . ." Meyer, *The Equitable Bill of Review in Texas*, 41 TEX. B.J. 699, 702 (1978). The litigant in order to obtain injunctive relief must give a probable right of

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3 Texas is not alone in requiring a meritorious defense; the majority of federal circuit courts require proof of a meritorious defense. *See Mendoza v. Wright Vineyard Management*, 783 F.2d 941 (9th Cir. 1986); *Brock v. Unique Racquetball and Health Clubs, Inc.*, 786 F.2d 61 (2nd Cir. 1986); *Pena v. Seguras La Comercial, S.A.*, 770 F.2d 811 (9th Cir. 1985); *U.S. v. One 1979 Rolls-Royce Corniche Convertible*, 770 F.2d 713 (7th Cir. 1985); *Bond Leather Co., Inc. v. Q.T. Shoe Mfg. Co., Inc.*, 764 F.2d 928 (1st Cir. 1985); *U.S. v. One Parcel of Real Property*, 763 F.2d 181 (5th Cir. 1985); *U.S. v. $55,518.05 In Currency*, 728 F.2d 192 (3rd Cir. 1984); *U.S. v. Moradi*, 673 F.2d 725 (4th Cir. 1982); *In Re Stone*, 588 F.2d 1316 (10th Cir. 1978).

prevailing and show irreparable injury. *Millwrights Local Union No. 2484 v. Rust Engineering Co.*, 433 S.W.2d 683 (Tex. 1968). Injunctive relief should be first in the form of a temporary restraining order and later in the form of a temporary injunction. Indeed, "if the injunction is worded properly, [it] will remain in effect until all appeals [on the merits] have been exhausted." Siskind, *Bill of Review -- The Last Chance*, 20 S. TEX. L.J. 237, 247 (1980). The exhaustion of all appeals to the Supreme Court can forestall execution of the property for many years. No litigant can in all honesty claim that property was taken without an opportunity to be heard.

B. Post-Judgment Remedies For Voidable Judgments In Texas Protect Due Process Rights

Texas' procedure for overturning voidable default judgments does not violate the Due Process Clause. The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U. S. Const. amend. XIV, § 1. Due process of law means notice and an opportunity to be heard. *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932). The various post-judgment remedies in Texas by allowing multiple *de-novo* review opportunities provide exactly such notice and opportunity.

III. THE AVAILABILITY OF COLLATERAL ATTACK AGAINST THE DEFAULT JUDGMENT ENTERED IN THIS CASE EFFECTIVELY NEGATES APPLICATION OF THE BILL OF REVIEW PROCEDURE TO APPELLANT-PERALTA

Appellant-Peralta did, and still does, have a fundamentally fair and even-handed remedy under Texas law. The fact that he chose a more onerous legal course should not justify this Court's intervention.

CONCLUSION

Amicus Curiae State of Texas requests this Court to dismiss the appeal.

October 8, 1987

Respectfully submitted,

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POST-ARGUMENT BRIEF

(9)

86 1430

No. 86-1320

IN THE

Supreme Court of The United States

OCTOBER TERM, 1987

R. "ROY" PERALTA,
Appellant,

v.

HEIGHTS MEDICAL CENTER, INC.
d/b/a HEIGHTS HOSPITAL and
MR. AND MRS. PAUL SENG-NGAN CHEN
Appellees.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

APPELLEE'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

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December, 1987

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ON APPEAL FROM THE SUPREME COURT OF TEXAS

APPELLEE'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

Appellant R. "Roy" Peralta filed a reply brief in this case on November 23, 1987, seven days before oral argument was scheduled. The Certificate of Service accompanying the Reply Brief for Appellant states it was served upon counsel for Heights Medical Center "by express mail, next day delivery, this the 23rd day of November, 1987." Therefore, counsel for Heights Hospital should have received the reply brief on November 24, 1987, in ample time to prepare for oral argument.

Counsel for Heights Hospital received the reply brief in counsel's offices in Houston on November 30, 1987, the day of oral argument. Therefore, at the time of oral argument, counsel for Heights Hospital was unaware that a reply brief had been filed. This prejudiced counsel's ability to argue the case effectively and to respond in oral argument to the issues addressed in Appellant's reply brief. Accordingly, pursuant to Supreme Court Rules 35.5 and 35.6, Heights Hospital

requests leave to file the following response to Appellant's reply brief.

SUMMARY OF ARGUMENT

A void judgment implicates no property or liberty interests because under state law a void judgment has no force. Even if this Court holds that the mere existence of a void judgment deprives a defendant of liberty or property however, the post-judgment remedies available under state law cure any constitutional defect. A defendant against whom a void default judgment has been rendered is given the same due process as one who is properly served. If a meritorious defense exists, the defendant will receive a full trial on the merits. If no meritorious defense exists, summary judgment will be rendered as occurred in this case. Regardless of the process provided, however, a defendant with no meritorious defense cannot prevent a judgment from being rendered against him.

A deprivation caused by the mere existence of a judgment must be distinguished from a deprivation caused by the attempted enforcement of a judgment. Any deprivation of liberty or property caused by the attempted enforcement of a void judgment before full process is provided can be set aside simply by showing that it occurred pursuant to a void judgment. In fact, even if a judgment is valid, an execution sale can be set aside if it was done without notice and the property sold is worth more than the price paid at the sale.

ARGUMENT AND AUTHORITIES

A Void Judgment Implicates No Property Or Liberty Interests

If the judgment at issue in this case is void for lack of personal jurisdiction, then under Texas law it implicates no liberty or property interests:

> A void judgment has been termed *mere waste paper,* an absolute nullity; and all acts performed under it are absolute nullities. Again, it has been said to be *in law no judgment at all,* having no force or effect, conferring no rights, and binding nobody. 'It is good nowhere and bad everywhere,' and neither lapse of time nor judicial action can impart validity.

Commander v. *Bryan,* 123 S.W.2d 1008, 1015 (Tex. Civ. App. — Ft. Worth 1938, no writ) (emphasis added). Under Texas law, a void judgment cannot properly have an effect on a defendant's credit rating, cloud title to a defendant's property or form the basis of a valid execution. A void judgment does not alter a defendant's legal status because it does not affect legal rights. It does not imbue any debt with the authority of state law because under state law it has no authority.

Even If The Mere Existence Of A Void Judgment Somehow Implicates A Liberty Or Property Interest, State Law Provides Constitutionally Adequate Remedies

Even if the mere existence of a void judgment implicates a constitutionally protected interest, the remedies provided by state law give a defendant the same opportunity to avoid the existence of the judgment as if he had been properly served in the first place. Thus, the bill of review procedure is not constitutionally defective.

The meritorious defense requirement is designed to determine whether any type of process will afford a defendant the

hope of achieving the desired result; specifically, the avoidance of the existence of a judgment. Where there is no meritorious defense, no hearing will allow the defendant to avoid the very existence of a judgment and no additional process is constitutionally required. *Codd* v. *Velger,* 429 U.S. 624, 627-28 (1977) (hearing not required where no hearing could afford a promise of achieving the desired result).

Armstrong v. *Manzo,* 380 U.S. 545 (1965), cited by Peralta, does not hold to the contrary. In *Armstrong,* the state court rendered an adoption decree terminating the father's parental rights. This Court held that rendering the adoption decree without notice to the father was a violation of due process. This Court also recognized, however, that an adequate post-judgment hearing could cure the constitutional defect and therefore went on to consider the adequacy of the post-judgment hearing provided to the father. Unlike the present case there was no question as to whether the father had pursued the appropriate post-judgment remedy. This Court held that the post-judgment hearing was inadequate because the state court imposed on the father the potentially outcome determinative burden of affirmatively showing that he had contributed to the financial support of his daughter to the limit of his financial ability over the previous two years. The father would not have faced this burden had he been given timely notice of the original proceeding.

In the present case, Peralta faces no burden he would not have faced in the original proceeding. There is no shifting of the burden of proof as in *Armstrong.* In the bill of review proceeding Peralta's burden to show a meritorious defense and defeat Heights Hospital's motion for summary judgment was identical to the burden of proof he would have faced to defeat an identical motion for summary judgment

by Heights Hospital in the original suit. In effect, Peralta has had a brand new trial before a court whose jurisdiction he invoked. Heights Hospital affirmatively undertook the burden of proving its case anew when it filed its motion for summary judgment. Heights Hospital affirmatively proved that Peralta owed the debt and had no defense. Peralta could not avoid the judgment regardless of the process provided. Accordingly, the trial court made the narrow ruling that Peralta had no meritorious defense and therefore could not maintain a petition for a bill of review.[1] The trial court did not decide whether the original judgment was void because it did not need to reach that issue in order to decide that Peralta was not entitled to a new trial. The trial court did not decide whether Peralta could have the execution sale set aside. Nor did Peralta ever suggest to the trial court that it should render only a partial judgment because there were separate issues as to whether he was entitled to have the execution sale set aside on the grounds that it took place before he had notice of the lawsuit. Instead, Peralta properly chose to collaterally attack the execution sale in a separate proceeding which is still pending.

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[1] There is some question as to the legal effect of the trial court's ruling. Under Texas law, a void judgment cannot be validated by a subsequent legal proceeding. Therefore, if the default judgment was void when rendered, it is still void and the order in the bill of review proceeding constitutes a new final judgment. *McEwen* v. *Harrison,* 162 Tex. 125, 345 S.W.2d 706, 710 (1961); *Texas Employers' Ins. Ass'n.* v. *Arnold,* 126 Tex. 466, 88 S.W.2d 473, 474 (1935). The bill of review court has the power to render a new judgment because it clearly has jurisdiction over Peralta and considered the merits of the original case. If the default judgment is not void, then the bill of review court's ruling simply leaves the original judgment intact. Since no court has ruled on the voidness issue, the effect of the bill of review court's ruling is unclear.

Collateral Attacks Are Available To Peralta To Remedy Any Deprivation Caused By Improper Enforcement Of The Judgment

Any deprivation resulting from the mere existence of the judgment must be distinguished from a deprivation caused by improper enforcement of the judgment. The bill of review procedure is intended to replace an incorrect judgment with a correct one in circumstances that justify changing the original judgment. It is neither intended nor designed to remedy deprivations that result from improper enforcement.[2] State law provides other remedies for that purpose which do not turn on the existence of a meritorious defense.

Under Texas law, a judgment, whether void or not, does not by itself create a lien on the defendant's property. *Burton Lingo Co.* v. *Warren,* 45 S.W.2d 750, 752 (Tex. Civ. App. — Eastland 1931, writ ref'd). A lien is created by a properly recorded abstract of judgment. Tex. Prop. Code. Ann. § 52.001 (1984). An abstract recorded pursuant to a void judgment is itself void and creates no enforceable lien. If the defendant files a proper action, a void abstract will be expunged. *See Gill* v. *Quinn,* 613 S.W.2d 324 (Tex. Civ. App. — Eastland 1981, no writ); *Fannin Bank* v. *Johnson,* 432 S.W.2d 138 (Tex. Civ. App. — Houston [1st Dist.] 1968, writ dism'd). An execution sale pursuant to a void judgment is likewise void, is ineffective to pass title and can be set aside simply by showing the voidness. *Kellogg* v. *Southwestern Lumber Co.,* 44 S.W.2d 742, 744-45 (Tex. Civ. App. — Beaumont 1931, writ ref'd). Similarly, if a void

[2] Even if Peralta had prevailed in his bill of review action, it would not necessarily have cleared his title to the property allegedly sold at the execution sale. *See A.H. Belo* v. *Sanders,* 598 S.W.2d 7 (Tex. Civ. App. — Texarkana 1980, no writ).

judgment appears on a defendant's credit report, the defendant can dispute the report and have the judgment deleted. 15 U.S.C. § 1681i (1982).

If Peralta prevails in any collateral attack on the grounds of voidness, then the voidness ruling in the collateral proceeding will be of record and should be res judicata in any subsequent proceeding. Peralta does not face the specter of making repeated collateral attacks against multiple enforcement attempts. Indeed, part of any ruling in a collateral attack could be an injunction against further enforcement attempts.

Peralta's burden in making a collateral attack on the judgment on voidness grounds is no different than it would be in a direct attack absent the meritorious defense requirement. Peralta need only prove that the attempted deprivation of liberty or property is in fact pursuant to the judgment in issue and that the judgment is in fact void.

Peralta contended in oral argument that collateral attacks are not open to him because of the jurisdictional recitals in the default judgment. It is true that the "general rule" in Texas is that the jurisdictional recitations in a judgment are entitled to absolute verity in a collateral proceeding and cannot be contradicted by extrinsic evidence. Like most "general rules" however, this rule is riddled with exceptions. For example, when a judgment identifies the type of service upon which the court relied for jurisdiction, extrinsic evidence is admissible to show that the court could not have obtained jurisdiction in the manner recited. *E.g., Lutcher* v. *Allen,* 95 S.W. 572 (Tex. Civ. App. 1906, writ ref'd) (recital that "citation by publication has been duly and legally made" could be contradicted by extrinsic evidence); *Fowler* v. *Simpson,* 15 S.W. 682 (Tex. 1891) (extrinsic evidence was admissible to contradict the recitation of jurisdiction in the

judgment because the judgment identified the citation on which jurisdiction was based).

The judgment at issue here identifies the citation upon which the court based its conclusion of proper service by indicating that it relied on the "citation with the officer's return [which has] been on file with the clerk of the court for ten days . . .". Thus, there is no bar to Peralta introducing evidence to show that the court could not have obtained jurisdiction over him by means of the identified citation.

If, as Peralta argues, collateral attacks are not open to him because of the jurisdictional recitals in the default judgment, then *the collateral attack procedure* may be constitutionally defective. Texas courts have expressly recognized this possibility but the Texas Supreme Court has never had to decide the issue. *See Crawford* v. *McDonald*, 33 S.W. 325, 328 (Tex. 1895) (recognizing that *Pennoyer* v. *Neff*, 95 U.S. 714 (1878), may require that a defendant making a collateral attack be allowed to contradict jurisdictional recitals in a default judgment); *Commander* v. *Bryan*, 123 S.W.2d at 1014 (as a matter of due process, a judgment may be attacked collaterally as void even when it recites findings of jurisdictional facts). In any event, the constitutional adequacy of the available collateral attacks should not be decided in this proceeding. Only the constitutionality of the meritorious defense requirement of the bill of review procedure under Rule 329b(f) of the Texas Rules of Civil Procedure should be considered by this Court.

Peralta Also Is Protected By The Availability Of Attacks On The Execution Sale

Under Texas law, execution on a judgment requires that advance notice of the execution sale be given to the judgment debtor. This notice is intended to give the debtor the opportunity to pay the judgment or contest its

enforceability. Therefore, if, as Peralta alleges, he did not receive notice of the execution, it was this lack of notice of the execution sale that directly resulted in the deprivation of property. Peralta can set aside such an improper execution sale regardless of whether the judgment is void if, as he contends, he did not receive notice of the judgment or the execution sale and the property sold was worth more than the price paid at the execution sale. *Bean* v. *City of Brownwood*, 45 S.W. 897 (Tex. 1898) (despite valid judgment, sale must be set aside due to a lack of notice unless there is no injury). *See Dodson* v. *Langford*, 26 S.W.2d 924 (Tex. Civ. App. — Dallas 1930, no writ) (where notice of execution sale mailed to wrong address it was proper to give a peremptory instruction for the plaintiff in a suit to set aside an execution sale). *If* Peralta had his property taken without due process, it is not because of the bill of review procedure; it is because he did not receive the notice of the execution sale which Texas law requires. Texas law provides an adequate remedy for this procedural defect if it occurred.

This Court Should Not Require The State To Modify The Bill Of Review Procedure To Accomplish A Purpose It Was Never Designed To Achieve

If Peralta was deprived of property without notice, then the Constitution may require the state to provide a remedy which will put Peralta in the position he would have occupied had due process been accorded him in the first place. *Armstrong* v. *Manzo*, 380 U.S. at 552. Under basic tenets of federalism however, the Constitution does not prescribe the specific form of the remedies which must be available. The Constitution does not require the state to take a procedure intended to correct incorrect judgments and modify it so as to vacate judgments and defective execution sales simply because a petitioner chose the wrong remedy and got a bad result. It is not a violation of due process for

the state to prescribe separate procedures for those without a meritorious defense as long as the procedures will afford full relief.

There is an obvious dispute in this case as to the adequacy of the remedies available to those without a meritorious defense. The adequacy of those remedies, however, does not turn on the fact that there exists a different remedy available to those with a meritorious defense. Moreover, the adequacy of the available remedies should not be decided in this case in which none of those remedies was invoked by Peralta or presented to the state court. The constitutional adequacy of those remedies should be determined in a case where they were at issue in the state court. As this Court has stated, a federal court should not base its constitutional decision on the basis of preliminary guesses about local law. This Court should avoid such guesswork by awaiting a definite determination on local law by the state court in a case in which the relevant local law was in issue before the state courts. *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944).

CONCLUSION

A void judgment is unenforceable and by itself implicates no liberty or property interests. Even if a void judgment does implicate a protected interest however, the bill of review procedure provides adequate protection. If a meritorious defense exists then a full trial on the merits will be provided. If no meritorious defense exists, then no amount of process will afford any hope of relief from the existence of the judgment and no additional process is constitutionally required. The same is true in cases where a defendant is properly served.

To the extent that protected interests may be affected by improper enforcement of an unenforceable judgment, Texas law provides separate remedies which impose no burden upon Peralta which he would not have in a direct proceeding. Those remedies were not pursued by Peralta in the state court and the constitutional adequacy of those remedies should not be decided in this proceeding.

It is not a violation of due process to have one type of procedure for parties with a meritorious defense and other procedures for those without. Under principles of federalism, the Constitution does not mandate the specific form of remedies which must be made available by the state. The Constitution requires only that the available remedies place a party in the position he would have been in had process been provided initially. The remedies available to Peralta accomplish this goal.

The judgment of the state court should be affirmed.

Respectfully submitted,

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